

No. 16440 ✓

United States
Court of Appeals
for the Ninth Circuit

PATRIARCA MFG. INC., a corporation, DOME-
NICO PATRIARCA and DONALD A. CAM-
ERON, Appellants,

vs.

MELVIN SOSNICK, MARVIN SOSNICK and
PETER SOSNICK, a co-partnership doing
business as Melvin Sosnick Co., et al.,
Appellees.

Transcript of Record

In Two Volumes
VOLUME I
(Pages 1 to 197 inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

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Appellants,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 35332

PATRIARCA MFG., INC., a corporation, DOME-
NICO PATRIARCA, an individual, and DON-
ALD A. CAMERON, an individual,
Plaintiffs,

vs.

MELVIN SOSNICK, MARVIN SOSNICK, and
PETER SOSNICK, a copartnership doing
business as MELVIN SOSNICK CO., and
MELVIN SOSNICK, MARVIN SOSNICK
and PETER SOSNICK, individuals,
Defendants.

AMENDED COMPLAINT

Comes now Patriarca Mfg. Inc., a corporation,
Domenico Patriarca, an individual, and Donald A.
Cameron, an individual, and for cause of action
against the defendants, Melvin Sosnick Co., a co-
partnership, and Melvin Sosnick, Marvin Sosnick,
and Peter Sosnick, individuals, allege:

I.

That plaintiff, Patriarca Mfg., Inc., is a corpora-
tion duly organized and existing under and by vir-
tue of the laws of the State of Rhode Island, and
has a principal place of business in the City of
Providence, State of Rhode Island; that plaintiffs,

Domenico Patriarca and Donald A. Cameron, are individuals and residents of the City of Cranston, State of Rhode Island.

II.

That plaintiffs are informed and believe and on information and belief allege that defendant, Melvin Sosnick Co., is a copartnership consisting of Melvin Sosnick, Marvin Sosnick and Peter Sosnick, and has its principal place of business in the City and County of San Francisco, State of California; within the jurisdiction of this Court.

III.

That plaintiffs are informed and believe and on information and belief allege that defendants, Melvin Sosnick, Marvin Sosnick and Peter Sosnick are individuals, citizens of the State of California, and have a place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

IV.

That this Court has jurisdiction of this action because the same arises under the Patent Laws of the United States.

V.

That on December 2, 1952, Design Letters Patent of the United States No. Des. 168,288, entitled "Self-Service Display Container", was legally and duly issued to Donald A. Cameron and that by as-

signment of said Design Letters Patent, plaintiff, Domenico Patriarca, is now and has been, at all times mentioned herein, the owner of an undivided one-half interest in, to and under said Design Letters Patent of the United States; that plaintiffs, Domenico Patriarca and Donald A. Cameron, are now and have been, at all times mentioned herein, the owners of the entire interest in, to and under said Design Letters Patent of the United States; that plaintiff, Patriarca Mfg., Inc., by virtue of an agreement in writing, became the exclusive licensee to manufacture, use and sell the invention of said Design Letters Patent No. Des. 168,288.

VI.

That on February 21, 1956, Letters Patent of the United States No. 2,735,739, entitled "Self-Server Display Cabinet", was legally and duly issued to Domenico Patriarca and that said Domenico Patriarca is the owner of said Letters Patent; that plaintiff, Patriarca Mfg., Inc., by an agreement in writing became the exclusive licensee to manufacture, use and sell the invention of said Letters Patent of the United States No. 2,735,739.

VII.

That plaintiffs allege that prior to the filing of the complaint herein and within six (6) years last within the jurisdiction of this Court, at San Francisco, California, and elsewhere, the said defendants, and each of them, infringed said Design Let-

ters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 by manufacturing and selling and offering to manufacture and sell or using or causing to be used devices which embody the inventions claimed in said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendants, and each of them, have derived unlawful gains and profits from the said infringing acts which plaintiffs would otherwise have received but for such infringement by defendants, and said infringement by defendants has caused plaintiffs large damages and irreparable injury and will continue so to do unless enjoined by this Court.

IX.

That defendants, and each of them, have had direct notice of said patents and were notified to desist from infringement thereof, but refused so to do and continue their said infringement.

X.

That plaintiffs are informed and believe and on information and belief allege that the infringement of plaintiffs' said patents by said defendants was done knowingly and in wanton and deliberate disregard of plaintiffs' rights thereunder.

XI.

That plaintiffs have been damaged by the infringing acts of defendants in an amount of at least Ten Thousand Dollars (\$10,000.00).

Wherefore Plaintiffs Pray:

1. For a preliminary and a permanent injunction restraining the defendants, and each of them, their agents, servants, employees and those in privity with them, or any of them, from directly or indirectly making or causing to be made, selling or causing to be sold, using or causing to be used, or offering for sale the devices coming within the scope of Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and from infringing upon and violating the plaintiffs' rights thereunder in any manner whatsoever.

2. For an accounting of damages from the defendants for the infringement of said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 and that said damages be trebled in view of the wanton and deliberate character of the infringement.

3. That plaintiffs have judgment against the defendants for reasonable attorneys' fees incurred by plaintiffs in this action.

4. That plaintiffs have judgment against the defendants for plaintiffs' costs and disbursements herein and for such other and different relief as

this Court may deem meet and proper in the premises.

PATRIARCA MFG., INC.,
DOMENICO PATRIARCA,
DONALD A. CAMERON.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 4, 1956.

In the United States District Court, Northern
District of California, Southern Division

Civil Action No. 35349

PATRIARCA MFG., INC., a corporation, DOME-
NICO PATRIARCA, an individual, and DON-
ALD A. CAMERON, an individual,
Plaintiffs,

vs.

ALFRED AUSTRUY, an individual, FIRST
DOE, SECOND DOE, X AND Z COM-
PANY, a corporation, DOE AND ROE, a
copartnership, and BLACK AND WHITE
COMPANY, a copartnership,
Defendants.

AMENDED COMPLAINT

Comes now Patriarca Mfg., Inc., a corporation,
Domenico Patriarca, an individual, and Donald A.

Cameron, an individual, and for cause of action against the defendants above named, allege:

I.

That plaintiff, Patriarca Mfg., Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Rhode Island, and has a principal place of business in the City of Providence, State of Rhode Island; that plaintiffs Domenico Patriarca and Donald A. Cameron, are individuals and residents of the City of Cranston, State of Rhode Island.

II.

That plaintiffs are informed and believe and on information and belief allege that defendant, Alfred Austruy, an individual, is a citizen of the State of California, and has a place of business in the City and County of San Francisco, State of California, within the jurisdiction of this Court.

III.

That the defendants, First Doe, Second Doe, X and Z Company, a corporation, Doe and Roe, a copartnership, and Black and White Company, a copartnership, are designated herein by fictitious names for the reason that their true names are unknown to plaintiffs, and plaintiffs will, upon ascertaining their true names or the true names of any of them, substitute the same for said fictitious names by proper amendment or amendments to the complaint.

IV.

That this Court has jurisdiction of this action because the same arises under the Patent Laws of the United States.

V.

That on December 2, 1952, Design Letters Patent of the United States No. Des. 168,288, entitled "Self-Service Display Container", was legally and duly issued to Donald A. Cameron and that by assignment of said Design Letters Patent, plaintiff, Domenico Patriarca, is now and has been, at all times mentioned herein, the owner of an undivided one-half interest in, to and under said Design Letters Patent of the United States; that plaintiffs, Domenico Patriarca and Donald A. Cameron, are now and have been, at all times mentioned herein, the owners of the entire interest in, to and under said Design Letters Patent of the United States; that plaintiff, Patriarca Mfg., Inc., by virtue of an agreement in writing, became the exclusive licensee to manufacture, use and sell the invention of said Design Letters Patent No. Des. 168,288.

VI.

That on February 21, 1956, Letters Patent of the United States No. 2,735,739, entitled "Self-Server Display Cabinet", was legally and duly issued to Domenico Patriarca and that said Domenico Patriarca is the owner of said Letters Patent; that plaintiff, Patriarca Mfg., Inc., by an agree-

ment in writing, became the exclusive licensee to manufacture, use and sell the invention of said Letters Patent of the United States No. 2,735,739.

VII.

That plaintiffs allege that prior to the filing of the complaint herein and within six (6) years last past within the jurisdiction of this Court at San Francisco, California, and elsewhere, the said defendants infringed said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739 by using or causing to be used devices which embody the inventions claimed in said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739.

VIII.

That plaintiffs are informed and believe and on information and belief allege that the defendants have derived unlawful gains and profits from the said infringing acts which plaintiffs would otherwise have received but for such infringement by defendants, and said infringement by defendants has caused plaintiffs large damages and irreparable injury and will continue so to do unless enjoined by this Court.

IX.

That defendants have had direct notice of said patents and were notified to desist from infringement thereof, but refused so to do and continue their said infringement.

X.

That plaintiffs are informed and believe and on information and belief allege that the infringement of plaintiffs' said patents by said defendants was done knowingly and in wanton and deliberate disregard of plaintiffs' rights thereunder.

XI.

That plaintiffs have been damaged by the infringing acts of defendants in an amount unknown by plaintiffs, but plaintiffs ask leave to amend this Amended Complaint when the amount of damage has been determined.

Wherefore Plaintiffs Pray:

1. For a preliminary and a permanent injunction restraining the defendants, and each of them, their agents, servants, employees and those in privity with them, or any of them, from directly or indirectly using or causing to be used, the devices coming within the scope of Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and from infringing upon and violating the plaintiffs' rights thereunder in any manner whatsoever.

2. For an accounting of damages from the defendants for the infringement of said Design Letters Patent No. Des. 168,288 and Letters Patent No. 2,735,739, and that said damages be trebled in view of the wanton and deliberate character of the infringement.

3. That plaintiffs have judgment against the defendants for reasonable attorneys' fees incurred by plaintiffs in this action.

4. That plaintiffs have judgment against the defendants for plaintiffs' costs and disbursements herein and for such other and different relief as this Court may deem meet and proper in the premises.

PATRIARCA MFG., INC.,
DOMENICO PATRIARCA,
DONALD A. CAMERON.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed September 4, 1956.

[Title of District Court and Cause No. 35332.]

ANSWER

I.

Answering paragraph 1 of the complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

II.

Answering paragraph II of the complaint, defendant denies that Melvin Sosnick Company is a copartnership consisting of Melvin Sosnick, Marvin

Sosnick and Peter Sosnick, but does admit that Melvin Sosnick Co. is a copartnership consisting of Melvin Sosnick, Marvin Sosnick, Peter Sosnick, Celia Sosnick, and Eugene Sosnick, and admits that said Melvin Sosnick Co. has its principal place of business in the City and County of San Francisco, State of California.

III.

Answering paragraph 3 of the complaint, defendant admits the allegation therein.

IV.

Defendant admits that this court has jurisdiction of this action insofar as it arises under the Patent Laws of the United States.

V.

Answering paragraph V of the complaint, defendant admits that on December 2, 1952, Design Letters Patent of the United States, No. 168,288, issued to D. A. Cameron, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said Design Patent.

VI.

Answering paragraph VI, defendant admits that on February 21, 1956, Letters Patent of the United States No. 2,735,739, issued to Domenico Patriarca, but denies that said patent was legally and duly

issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said patent.

VII.

Answering paragraph VII of the complaint, defendant alleges that it has not infringed the patents in suit, nor either of them, and is not liable for infringement thereof, and that said patents are not enforceable against him. As a further answer, defendant states that plaintiff has not designated wherein defendant is alleged to have infringed either of the mentioned patents purportedly owned by plaintiff.

VIII.

Answering paragraph VIII of the complaint, defendant denies each and every allegation therein.

IX.

Answering paragraph IX of the complaint, the defendants admit that notice of infringement has been received from the plaintiff, but denies that defendant has ever infringed said patents.

X.

Answering paragraph X of the complaint, the defendants deny each and every allegation therein.

XI.

Answering paragraph XI of the complaint, defendant denies each and every allegation contained therein.

XII.

Defendant alleges that each of the claims of the patents in suit is invalid and wholly void on each and every one of the following grounds:

(a) United States Letters Patent:

984,006 Kade
2,544,975 Berger
2,432,736 Elkins
2,118,213 Malott
1,721,132 Orthwine
1,782,819 Hansen
1,934,834 Voigt
2,503,419 Secunde
542,475 Hoare
2,430,124 Johnson
2,067,118 Case
635,191 Sanger
1,452,242 Jensen
1,106,543 Burnham et al.
2,303,098 Waldo.
D-111,868 Tyler
D-145,834 Chase
D-154,674 Gochenour, Jr.
2,056,311 Pavlick.

British Letters Patent: 525,916/40 Sleigh.

Italian Letters Patent: 459,257/50 Taina.

Publication: Tyler, "Welded Steel Commercial Refrigerators", copyright 1948, page 38, Model R8X.

Prior Public Uses and Sales: By Rubinfeld Showcase Co., Los Angeles, California.

Defendant is continuing an investigation of prior patents, prior publications and prior public uses and sales and prays leave to amend its answer to include additional defenses when the same are ascertained.

(b) The alleged inventions and each of them were patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the applications for patents in the United States. The list of patents, publications and prior public uses and sales in paragraph XII(a), above, is incorporated herein by reference.

(c) Each of the applicants abandoned his alleged invention.

(d) The alleged invention and each of them were described in a patent or patents granted on an application for patent by another filed in the United States before the alleged invention thereof by the applicants for patents. The list of patents in paragraph X(a), above, is incorporated herein by reference.

(e) Neither of the applicants did himself invent the subject matter sought to be patented.

(f) As to each of the patents, the invention therein was made before the applicant's invention by another who had not abandoned, suppressed, or concealed it. The list of patents, publications and prior public uses in paragraph XII(a), above, is incorporated herein by reference.

(g) The differences between the subject matter of the alleged inventions patented and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which such subject matter pertains.

XIII.

As a further defense, defendant alleges that this suit is not a bona fide attempt to enforce patents under the Patent Laws of the United States, but is a frivolous and vexacious suit brought only to harrass the defendant and its customers and to damage the reputation and business of the defendant.

XIV.

Defendants are informed and believe and therefore on such information and belief, allege, that the patents in suit, and each of them, are invalid and void because the claims thereof are not patentably distinct from each other.

XV.

Defendant further alleges upon information and belief that said patents are unenforceable on the grounds of misuse of the patent grant. Plaintiff is illegally attempting to control the sale of an unpatented commodity which is in the public domain, by means of said patents, thereby rendering said patents unenforceable.

XVI.

Defendant further alleges upon information and belief that said patents are unenforceable and invalid on the grounds of double patenting. Plaintiff has obtained two patents covering identical subject matter.

XVII.

Defendant pleads any other facts or acts made a defense under Title 35, U. S. Code.

Wherefore, Defendant Prays:

(A) That the complaint herein be dismissed with prejudice;

(B) That costs be awarded to the defendant and against the plaintiff;

(C) That attorneys' fees be awarded to the defendant to be paid by the plaintiff;

(D) Such other and further relief as to the Court may be deemed just.

Signed at: San Francisco, California. Dated:
April 19, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
One of the Attorneys for
Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause No. 35349.]

ANSWER

I.

Answering paragraph I of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

II.

Answering paragraph II of the complaint, defendants admit the same.

III.

Answering paragraph III of the complaint, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

IV.

Defendant admits that this court has jurisdiction of this action insofar as it arises under the Patent Laws of the United States.

V.

Answering paragraph V of the complaint, defendant admits that on December 2, 1952, Design Letters Patent of the United States, No. 168,288, issued to D. A. Cameron, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information

sufficient to form a belief as to the allegation of ownership of said Design Patent.

VI.

Answering paragraph VI, defendant admits that on February 21, 1956, Letters Patent of the United States, No. 2,735,739, issued to Domenico Patriarca, but denies that said patent was legally and duly issued and, further, answers that it is without knowledge or information sufficient to form a belief as to the allegation of ownership of said patent.

VII.

Answering paragraph VII of the complaint, defendant alleges that it has not infringed the patents in suit, nor either of them, and is not liable for infringement thereof, and that said patents are not enforceable against him. As a further answer, defendant states that plaintiff has not designated wherein defendant is alleged to have infringed either of the mentioned patents purportedly owned by plaintiff.

VIII.

Answering paragraph VIII of the complaint, defendant denies each and every allegation therein.

IX.

Answering paragraph IX of the complaint, the defendants admit that notice of infringement has been received from the plaintiff, but denies that defendant has ever infringed said patents.

X.

Answering paragraph X of the complaint, the defendants deny each and every allegation therein.

XI.

Answering paragraph XI of the complaint, defendant denies each and every allegation contained therein.

XII.

Defendant alleges that each of the claims of the patents in suit is invalid and wholly void on each and every one of the following grounds:

(a) United States Letters Patent:

984,006 Kade
2,544,975 Berger
2,432,736 Elkins
2,118,213 Malott
1,721,132 Orthwine
1,782,819 Hansen
1,934,834 Voigt
2,503,419 Secunde
542,475 Hoare
2,430,124 Johnson
2,067,118 Case
635,191 Sanger
1,452,242 Jensen
1,106,543 Burnham et al.
2,303,098 Waldo.
D-111,868 Tyler
D-145,834 Chase
D-154,674 Gochenour, Jr.
2,056,311 Pavlick.

British Letters Patent: 525,916/40 Sleigh.

Italian Letters Patent: 459,257/50 Taina.

Publication: Tyler, "Welded Steel Commercial Refrigerators", copyright 1948, page 38, Model R8X.

Prior Public Uses and Sales: By Rubinfeld Showcase Co., Los Angeles, California.

Defendant is continuing an investigation of prior patents, prior publications and prior public uses and sales and prays leave to amend its answer to include additional defenses when the same are ascertained.

(b) The alleged inventions and each of them were patented or described in a printed publication in this or a foreign country or in public use or on sale in this country more than one year prior to the date of the applications for patents in the United States. The list of patents, publications, and prior public uses and sales in paragraph XII(a), above, is incorporated herein by reference.

(c) Each of the applicants abandoned his alleged invention.

(d) The alleged inventions and each of them were described in a patent or patents granted on an application for patent by another filed in the United States before the alleged invention thereof by the applicants for patents. The list of patents in paragraph X(a), above, is incorporated herein by reference.

(e) Neither of the applicants did himself invent the subject matter sought to be patented.

(f) As to each of the patents, the invention therein was made before the applicant's invention by another who had not abandoned, suppressed, or concealed it. The list of patents, publications, and prior public uses in paragraph XII(a), above, is incorporated herein by reference.

(g) The differences between the subject matter of the alleged inventions patented and the prior art are such that the subject matter as a whole would have been obvious at the time the alleged invention was made to a person having ordinary skill in the art to which such subject matter pertains.

XIII.

As a further defense, defendant alleges that this suit is not a bona fide attempt to enforce patents under the Patent Laws of the United States, but is a frivolous and vexacious suit brought only to harrass the defendant and its customers and to damage the reputation and business of the defendant.

XIV.

Defendants are informed and believe and therefore on such information and belief, allege, that the patents in suit, and each of them, are invalid and void because the claims thereof are not patentably distinct from each other.

XV.

Defendant further alleges upon information and belief that said patents are unenforceable on the grounds of misuse of the patent grant. Plaintiff is illegally attempting to control the sale of an unpatented commodity which is in the public domain, by means of said patents, thereby rendering said patents unenforceable.

XVI.

Defendant further alleges upon information and belief that said patents are unenforceable and invalid on the grounds of double patenting. Plaintiff has obtained two patents covering identical subject matter.

XVII.

Defendant pleads any other facts or acts made a defense under Title 35, U. S. Code.

Wherefore, Defendant Prays:

(a) That the complaint herein be dismissed with prejudice.

(b) That costs be awarded to the defendant and against the plaintiff;

(c) That attorneys' fees be awarded to the defendant to be paid by the plaintiff;

(d) Such other and further relief as to the Court may be deemed just.

Signed at: San Francisco, California. Dated
April 19, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
One of the Attorneys for
Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed April 19, 1956.

[Title of District Court and Cause No. 35332.]

DEFENDANT'S NOTICE OF ADDITIONAL DEFENSES

Defendant gives to plaintiff the following notice of additional defenses pursuant to U. S. Code, Title 35, Section 282.

In addition to the matters pleaded in the Answer as invalidating the patents in suit, defendant will rely upon the following:

United States Patents—

Des. 51-128	Willson	August 7, 1917
Des. 119,508	Waddell	March 19, 1940
Des. 122,189	Vaughn	August 27, 1940
543,657	Rosenberg	July 30, 1895
615,438	Driggs	December 6, 1898
977,318	Leibe et al.	November 29, 1910

1,162,140	Dulgeroff	November 30, 1915
1,205,040	Skall	November 14, 1916
1,431,371	Chapman	October 10, 1922
1,504,747	DeWitt	August 12, 1924
1,617,799	Emanuel et al.	February 15, 1927
1,713,620	Pauk	May 21, 1929
2,575,643	Tamsen	November 20, 1951

Prior Uses and Sales—

American Showcase and Fixture Co., Los Angeles, California.

Dated at San Francisco, California, August 1, 1956.

DONALD F. FARBSTAIN,
ECKHOFF AND SLICK,
/s/ By ROBERT G. SLICK,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause No. 35332.]

STIPULATION RE ANSWER

It is hereby stipulated, by and between the parties hereto, through their respective counsel, that defendants' answer on file herein to the original complaint may stand as and for the answer to the Amended Complaint on file herein.

Dated: September 7th, 1956.

MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,
Attorneys for Plaintiffs.
/s/ ROBERT G. SLICK,
Attorney for Defendants.

So Ordered:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 10, 1956.

[Title of District Court and Cause No. 35349.]

STIPULATION RE ANSWER

It is hereby stipulated, by and between the parties hereto, through their respective counsel, that defendants' answer on file herein to the original complaint may stand as and for the answer to the Amended Complaint on file herein.

Dated: September 7th, 1956.

MELLIN, HANSCOM & HURSH,
/s/ JACK E. HURSH,
Attorneys for Plaintiffs.
/s/ ROBERT G. SLICK,
Attorney for Defendants.

So Ordered:

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 10, 1956.

In the United States District Court, Northern
District of California, Southern Division

No. 35332

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

MELVIN SOSNICK, et al., Defendants.

No. 35349

PATRIARCA MFG., INC., a corporation,
Plaintiff,

vs.

ALFRED AUSTRUY, an individual, et al.,
Defendants.

MEMORANDUM FOR JUDGMENT

Plaintiff owns a design patent (U. S. No. Des. 168,288, the Cameron) and a utility patent (U. S. No. 2,735,739, the Patriarca) covering a self-service cigar showcase; defendant Sosnick has sold a similar cigar showcase which is alleged to infringe plaintiff's patents, and defendant Austruy has made use of a similar cigar showcase which is alleged to infringe plaintiff's patents. The two cases have been consolidated for trial and judgment by stipulation in open court. Defendants set up various defenses including lack of invention, anticipation in the prior art, and no infringement.

Considering first the validity of the utility patent, the Patriarca, it is found that every physical element of the device is anticipated by the prior art. The elements of the Patriarca showcase are described in claims 3 and 4 of the utility patent (which are the sole claims of the patent relied upon here by the plaintiff), somewhat as follows:

The display cabinet for cigars includes a base, side walls, a rear wall, a top, a lower front wall, and an upper front opening; the upper front opening is covered with sliding glass doors which slant outward from top to bottom, permitting a retail customer to slide back the glass doors and serve himself from the selection of cigars displayed inside. The cigars are displayed in boxes which are placed on a series of wooden steps behind the glass doors; the wooden steps also serve as a partition between the cigars displayed to the public and the back portion of the cabinet which houses storage space for the merchant's stock of cigars, as well as a humidifier. The wooden step partition is perforated, permitting the humidified air to circulate among the cigars displayed as well as those stored behind the perforated partition. The rear wall includes sliding doors for access to the storage area and humidifier. The humidifier is elevated above the floor of the cabinet on the theory that better circulation of humidified air is obtained than if the humidifier were resting on the base or floor of the cabinet.

Two photographs, defendant's exhibits "K" and "M", which are hereby incorporated in this Memo-

randum for Judgment, depict a cigar showcase that was sold in San Francisco by the Royal Showcase Company, a manufacturer other than the plaintiff, more than a year before application was made for the Patriarca patent. Referring to that example of the prior art it can readily be seen that it includes a base, side walls, a rear wall, a top, a lower front wall, and an upper front opening covered by sliding glass doors which slant outward from top to bottom. The Royal cigar case also includes a series of wooden steps for displaying cigar boxes, a storage space behind the wooden steps with access at the rear through sliding doors, and a humidifier.

The wooden step partition is not perforated in this particular cigar showcase, but expert testimony produced by the defendant revealed that it has been common practice in the industry to ventilate the risers of the steps in that general type of showcase for many years prior to the Patriarca patent. That testimony was to the effect that the risers had been ventilated by constructing them of grooved or perforated wood or masonite, or expanded metal which would provide a grillwork for ventilation. Furthermore, during the course of the prosecution of the Patriarca Patent, the patent examiner rejected various claims of the inventor on the ground that "The provision of perforations where desired is an obvious expedient * * *"

The mere fact that plaintiff's device makes use of a humidifier cannot be relied upon to prove invention, because, as the evidence revealed, and as the patent examiner ruled, "the combination of a

display casing and a humidifying unit is old * * *

The Royal cigar case, too, made use of a humidifier that rested on the floor or base of the storage area. It is the raising of the humidifier off the floor of the storage area in the Patriarca device that is claimed to constitute invention. Plaintiff produced some evidence that the type of humidifier used in its showcase, a forced draft unit, functioned better when it was raised off the floor of the showcase. Defendants, on the other hand, produced expert testimony that the type of humidifier used in the accused device, a convection humidifier, functioned better when it was resting on the floor of the showcase rather than when it was raised some distance above the floor.

Therefore it is clear that every physical element of the Patriarca device was anticipated in similar showcases that were in common use in the industry, and the patent is relegated to the status of a "combination patent."

Combination patents are now judged by a more severe test than formerly, as shown by the discussion of the Court of Appeals for this circuit in *Oriental Foods, Inc. v. Chun King Sales, Inc.*, 244 F. 2d 909, 912 (9 Cir. 1957), quoting from the landmark case of *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 71 S.Ct. 127, 129:

"Courts should scrutinize combination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to

add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men."

The Court of Appeals also adopted the following quotation from *Consolidated Trimming Corp. v. London*, 239 F. 2d 33, 36 (D.C. Cir. 1957): "A mere advance in efficiency and utility is not enough to convert a non-inventive aggregation into a patentable combination." To the same effect see *Kwikset Locks v. Hilgren*, 210 F. 2d 483 (9 Cir. 1954).

Testing the validity of the Patriarca patent by those standards, this Court is brought inevitably to the conclusion that the Patriarca device constitutes an advance in efficiency and utility, but that the mere raising of the humidifier above the floor of the cabinet did not require the exercise of inventive talent beyond the powers of the ordinary skilled artisan in the field of humidified showcases.

Therefore it is the opinion and conclusion of this Court that the Patriarca patent is invalid for want of invention, and because it was anticipated in the prior art.

Considering now the Cameron design patent, this Court must test the validity of that patent claim by the same standards as are applied to a mechanical or utility patent. In discussing the standards

to be applied to design patents the Court of Appeals for this circuit said in *Majestic, etc. Co. v. Westinghouse, etc. Co.*, 276 Fed. 676, 678, (9 Cir. 1921):

“The result obtained must not only be new, as in utility patents, but it must be also original, * * * and, furthermore, it must be ornamental. This means it must possess the elements of beauty and attractiveness; and in all this there must be invention of design, which reaches beyond the exercise of mere mechanical skill.”

It is also important to remember in connection with the Cameron design patent that its validity cannot be bolstered or aided by a consideration of any functional improvements or advances claimed in the Patriarca mechanical patent. This rule was applied in *Laskowitz v. Marie Designer, Inc.*, 119 F. Supp. 541, 545, (S.D.Cal. 1954): “But differences in function and in methods of attaining the function, important though they might be in a different type of patent, have no significance in a design patent.” And at page 549: “Utility does not count in a design patent.” See also *Rowley v. Tresenberg*, 37 F. Supp. 90 (E.D.N.Y.) *aff’d*. 123 F. 2d 844 (2 Cir.), to the effect that in considering the question of infringement of a design patent, functional features are excluded.

It is simply the appearance of the object when it is viewed as a whole that determines whether or not the design is patentable. “The design must be considered by the impression it produces as a whole.” *Sel-O-Rak Corp. v. Henry Hanger, etc.*

Corp., 232 F. 2d 176, 179 (5 Cir. 1956). "A design must be judged from its appearance as a whole * * * *'" Application of Peet, 211 F. 2d 600, 601 (C.C.P.A. 1954).

The appearance of the Cameron design can be seen in figures 1, 2 and 3 of plaintiff's exhibit No. 2, which is hereby incorporated in this Memorandum. Referring again to the Royal cigar showcase as an example of the prior art, and comparing plaintiff's Cameron design when viewed as a whole, with the Royal showcase when viewed as a whole, the similarity is so great and the differences so slight, that it can only be said that both designs produce the same impression to the observer. This Court cannot say that the Cameron design produces a new impression upon the eye when it is compared to the Royal showcase; "The combination of old forms to produce a new and ornamental design is not patentable unless the new design produces a new impression upon the eye." *Forestek Plating & Mfg. Co. v. Knapp-Monarch Co.*, 106 F. 2d 554, 559 (6 Cir. 1939).

The Cameron design strongly resembles the prior art in general appearance and central theme, and as the court ruled in *Western Auto Supply Co. v. American-National Co.*, 114 F. 2d 711, 712 (6 Cir. 1940): "When the idea is adapted or derived by analogy from prior usage, or when it is embodied in a design resembling the prior art in general appearance or central theme, there is no patentable invention." The plaintiff's design is a particularly streamlined, well proportioned and

harmonious arrangement of the elements of the general type of showcase that had been in use in the industry prior to the application for the Cameron design patent, but it does not constitute something new, different and original in the art. As the Court of Appeals for this circuit held in *Magarian v. Detroit Products Co.*, 127 F. 2d 544, 545 (9. Cir. 1942): "It may readily be conceded, as appellant contends, that the design of the arm is streamlined and pleasing in appearance; but this is insufficient in the absence of invention. (Citations omitted.)"

Plaintiff produced the testimony of Mr. Marcus Glaser, who is unquestionably an expert in the field of cigar showcases; his testimony clearly established the commercial success of the Patriarca device which bears the Cameron design.

Evidence of the commercial success of a device is admissible in weighing the validity of a mechanical patent, but it is of real value only if the question of validity is a close one. This rule was expressed in *Pointer v. Six Wheel Corp.*, 172 F. 2d 153, 156 (9 Cir. 1949):

"Commercial success may be taken into consideration in determining validity. The trend, at the present time, is to use it as a makeweight only 'where the patentability question is close.' (Citations omitted)."

And in *Application of Lange*, 228 F.2d 245, 246, (C.C.P.A. 1955): "It is well settled, however, that commercial success cannot be relied on to establish

patentability except in cases which are otherwise doubtful. (Citations omitted)."

It is also true that in considering the validity of a design patent, evidence of commercial acceptance of the design, is relevant to the issue of invention:

"Whether a design which is novel and ornamental is entitled to coverage by a design patent depends to a large degree upon the reception which those for whom it is made, accord it."

Battery Patents Corp. v. Coe, 93 F.2d 220, 226 (D.C. Cir. 1937), quoting from Standard Match Corp. v. Bell Mach. Co., 83 F.2d 365, 367 (7 Cir. 1936).

But commercial success does not supply invention where that crucial element is clearly absent: "Where * * * invention is plainly lacking, commercial success cannot fill the void. (Citations omitted)." *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 567.

Furthermore, plaintiff made no attempt to demonstrate how much of the commercial success of its product was the result of the design of the device, how much was due to the claimed increase in mechanical efficiency, or how much might have been due to still other factors. The weakness of such a showing was described in *Circle S Products Co. v. Powell Products*, 174 F.2d 562, 564 (7 Cir. 1949):

"The commercial success which they claim for their product we think is of little, if any, benefit in the instant matter. As was pointed out in *Bayley & Sons, Inc. v. Standart Art Glass Co., et al.*, 2 Cir., 249 F. 478, in response to a similar argument, there is nothing in the record to show what portion of the

asserted success was due to the mechanical or utility features of the device and what, if any, was attributable to the design.”

The basic test of patentability of a design is the same as that for a mechanical patent, that is, was the design beyond the powers of the ordinary designer? *Connecticut Paper Products Co. v. New York Paper Co.*, 127 F.2d 423, and cases cited at 429 (4 Cir. 1942). A design may be sufficiently attractive and streamlined to achieve commercial success and yet be within the ability of the ordinary designer in the field. This factor is emphasized in *Butcher Boy Refrigerator Door Co. v. Phillips Refrigeration Products Co.*, 144 F.Supp. 331, 339 (N.D.Cal. 1956):

“More is required for a valid design patent than that the design be new and pleasing enough to catch the trade; it must be the product of invention, by which it is meant that conception of the design must demand some exceptional talent beyond the skill of the ordinary designer. *Neufeld-Furst & Co. v. Jay-Day Frocks*, 2 Cir., 112 F.2d 715; see also *S. Dresner & Son v. Doppelt*, 7 Cir., 120 F.2d 50; *Zangerle & Peterson Co. v. Venice Furniture & Novelty Mfg. Co.*, 7 Cir., 133 F.2d 266; *Hueter v. Compco Corp.*, 7 Cir., 179 F.2d 416.”

Accordingly, because the appearance of the Cameron design does not produce a new impression on the eye when compared with the prior art, and because the differences between the Cameron design and prior designs are within the ability of the ordinary designer in the field of display showcases, it is

the opinion and conclusion of this Court that the Cameron design patent is invalid for lack of invention and because of anticipation in the prior art.

Therefore it is concluded that Patriarca patent U.S. No. 2,735,739 is invalid as to claims 3 and 4 thereof; that Cameron patent U.S. No. Des. 168,288 is invalid; and that the defendants should be awarded judgment, together with their costs expended herein.

Counsel for defendants are directed to prepare and present findings, conclusions and a judgment in accordance herewith.

Dated: December 23rd, 1958.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed December 23, 1958.

[Title of District Court and Cause Nos. 35332 and 35349.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Patriarca Mfg. Co., Inc., is a corporation of Rhode Island having its principal place of business in Providence, Rhode Island.

2. Plaintiffs Domenico Patriarca and Donald A. Cameron are individuals and residents of the City of Cranston, State of Rhode Island.

3. Defendants Melvin Sosnick, Marvin Sosnick and Peter Sosnick are defendants in No. 35332 and individuals, all residents of the City and County of San Francisco, State of California and are doing business as a co-partnership in the City and County of San Francisco under the name and style of Melvin Sosnick Company. The said defendants will be referred to as the "defendants Sosnick."

4. The defendant Alfred Austruy is defendant in No. 35349 and is an individual and a resident of the City and County of San Francisco, State of California.

5. The suit against the defendants Sosnick (No. 35332) and the suit against the defendant Austruy (No. 35349) have been consolidated for trial.

6. On February 21, 1956, United States Letters Patent No. 2,735,739, entitled "Self-Server Display Cabinet" were issued to plaintiff Domenico Patriarca, said patent being referred to hereinafter as "the Utility Patent."

7. On December 2, 1952, United States Letters Patent No. Design 168,288, entitled "Self-Service Display Container" were issued to Donald A. Cameron, said patent being referred to hereinafter as "the Design Patent."

8. By virtue of exclusive license agreements between said individual plaintiffs and said corporate plaintiff the corporate plaintiff, Patriarca Mfg., Inc., is the exclusive licensee of both said patents and is a proper party herein.

9. This is a suit for alleged infringement of said Utility Patent and said Design Patent by defend-

ants, the said patents being for a cigar showcase, the Utility Patent being for the mechanical and utilitarian features thereof and the Design Patent being for the ornamental features thereof.

10. The defendants Sosnick admit having sold certain cigar showcases identical with plaintiffs' Exh. 10, a physical exhibit, and the defendant Austruy admits having purchased from the defendants Sosnick and having used a cigar showcase identical with plaintiffs' Exh. 10.

The Utility Patent
(Patriarca Patent No. 2,735,739)

11. By stipulation both suits have been dismissed with prejudice as to Claims 1 and 2 of the Utility Patent, leaving only Claims 3 and 4 thereof in issue.

12. Defendants have pleaded invalidity and non-infringement of the Utility Patent.

13. The Utility Patent is for the utilitarian and mechanical features of a cigar showcase typified by plaintiffs' Exh. 5 and comprising the following elements:

- (1) A base
- (2) Side walls
- (3) A rear wall
- (4) A top
- (5) A lower front wall
- (6) An upper front opening
- (7) Sliding glass doors for the upper front opening which slant outwardly from top to bottom permitting a retail customer to slide back the glass

doors and serve himself from the selection of cigars displayed inside.

(8) A series of steps behind the glass doors which serve as a support for boxes of cigars and as a partition between the cigars displayed to the public and the back portion of the cabinet which houses storage space for the merchant's stock of cigars as well as a humidifier (Element 9). Such partition is perforated to permit humidified air to circulate among the cigars displayed as well as those stored behind the partition.

(9) A humidifier which is elevated above the floor of the cabinet.

The rear wall (Element No. 3 above) includes sliding doors for access to the storage area and humidifier.

The humidifier (Element No. 9 above) is elevated above the floor of the cabinet on the theory (which is not stated in the descriptive portion of the patent) that better circulation of humidified air is obtained than if the humidifier were resting on the base or floor of the cabinet.

14. Each of the elements enumerated in Finding No. 13 is anticipated by the prior art.

15. Defendants' Exh. A, a physical exhibit, of which Exhs. K and M are admitted to be photographs, is a cigar showcase manufactured and sold by Royal Showcase Company of San Francisco, California more than one year prior to the filing date of the Utility Patent (and also more than one year prior to the filing date of the Design Patent). Such prior showcase will be referred to hereinafter as the "Royal showcase."

16. The Royal showcase contains elements (1) to (8) enumerated in Finding No. 13.

17. The wooden steps of the Royal showcase (corresponding to element No. (8) in Finding No. 13) are not perforated but it was known in the art prior to the filing date of the Utility Patent to provide such steps with partitions for the purpose of ventilation.

18. The provision of a humidifier for a cigar showcase is not inventive because the use of humidifiers for cigar showcases is old.

19. Plaintiffs contend that the elevation of their humidifier off of the floor or base of the showcase constitutes invention but such is not invention in view of convincing evidence that with a convection type of humidifier resting on the floor (as used by defendants) the performance is just as good and that elevation of such humidifier would have no beneficial effect. Moreover, if the elevation of the humidifier is a critical and inventive feature, then defendants do not appropriate such feature.

20. The showcase of the Utility Patent represents at best a combination of old features which produces no new result and which does not rise to the dignity of patentable invention.

21. The showcase of the Utility Patent represents an advance in efficiency and utility but the key element in this showcase, which plaintiffs contend is the elevation of the humidifier above the floor of the cabinet, would not require the exercise of inventive talent beyond the ordinary skilled artisan in the field of humidified showcases.

The Design Patent

(Cameron Patent Des. 168288)

22. Comparing the appearance of the showcase of the Design Patent with the appearance of the Royal showcase and viewed as a whole, the similarities are so great and the differences are so slight that the same impression is produced on the observer.

23. The showcase of the Design Patent does not produce a new impression on the eye when compared to the Royal showcase.

24. The showcase of the Design Patent strongly resembles the prior art in general appearance and central theme.

25. The showcase of the Design Patent is a particularly streamlined, well proportioned and harmonious arrangement of the elements of the general type of showcases that have been in use in the industry prior to the application for the Design Patent but it does not constitute something new, different and original in the art.

26. The testimony of Marcus Glaser, who is an expert in the field of cigar showcases, clearly established commercial success of the showcase of the Design Patent but the said showcase is so clearly lacking in invention that its commercial success cannot persuade one that the showcase presents the quality of patentable invention.

27. The evidence regarding commercial success of the showcase of the Design Patent does not demonstrate to what extent such commercial success was

due to the design itself, how much to the increase in mechanical efficiency (which forms no part of the alleged design invention) and how much to other factors.

28. The differences between the showcase of the Design Patent and prior designs such as the Royal showcase are within the ability of the ordinary designer in the field of display showcases.

29. The showcase of the Design Patent does not rise to the dignity of patentable invention.

Conclusions of Law

1. This Court has jurisdiction of the parties and of the subject matter.

2. Claims 3 and 4 of the Patriarca U. S. Patent No. 2,735,739 are invalid for lack of invention.

3. Cameron U. S. Design Patent No. Des. 168288 is invalid for lack of invention.

4. Claims 1 and 2 of Patriarca Patent No. 2,735,739 are withdrawn with prejudice.

5. The complaint should be dismissed with prejudice and costs allowed defendants.

Entered this 11th day of February, 1959.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 13, 1959.

In the United States District Court, Northern
District of California, Southern Division

No. 35332

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

MELVIN SOSNICK, et al., Defendants.

No. 35349

PATRIARCA MFG., INC., a corporation, et al.,
Plaintiffs,

vs.

ALFRED AUSTRUY, an individual, et al.,
Defendants.

JUDGMENT

These causes having come on for trial on plaintiffs' complaints and defendants' answers, the causes having been consolidated and tried and argued, findings of fact and conclusions of law having been adopted by the Court and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed,
as follows:

1. That the complaints on file herein be dismissed as to all defendants with prejudice and upon the merits.

2. That defendants be awarded costs in the amount of and have execution for the same.

Entered this 13th day of February, 1959.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed February 13, 1959.

[Title of District Court and Cause Nos. 35332 and 35349.]

NOTICE OF APPEAL

Notice is hereby given that plaintiffs, Patriarca Mfg., Inc., a corporation, Domenico Patriarca and Donald A. Cameron, individuals, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment dated and entered herein February 13th, 1959, for defendants, Melvin Sosnick, Marvin Sosnick and Peter Sosnick, a copartnership, doing business as Melvin Sosnick Co., and Melvin Sosnick, Marvin Sosnick and Peter Sosnick, individuals, and Alfred Austruy, an individual.

Dated: March 10, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Plaintiffs.

[Endorsed]: Filed March 10, 1959.

[Title of District Court and Cause Nos. 35332 and 35349.]

BOND FOR COSTS

Whereas, Patriarca Mfg., Inc., et al and Patriarco Mfg., Inc., a Corporation, have appealed to the United States Court of Appeals for the Ninth Circuit from certain judgments rendered against said Patricarca Mfg., Inc., et al and Patriarco Mfg., Inc., a Corporation, in said actions in the above entitled court and in favor of Melvin Sosnick, et al and Alfred Austruy, an individual, et al, and entered on February 13th, 1959.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned Glens Falls Insurance Company, a corporation organized and existing under the laws of the State of New York and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the above named Plaintiffs, that said Plaintiffs will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not exceeding Two Hundred Fifty Dollars (\$250.00), to which amount the Plaintiffs acknowledge themselves bound.

It is further stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above named Court may upon ten (10) days notice to the surety above named, proceed summarily in said proceedings to ascertain

the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor, not exceeding, however, the said sum of Two Hundred Fifty Dollars (\$250.00).

In Witness Whereof, the said Surety has caused these presents to be executed and its official seal attached by its duly authorized Attorney at San Francisco, California, this 9th day of March, 1959.

[Seal] GLENS FALLS INSURANCE
COMPANY,

/s/ By FRANK W. PAYNE,
Attorney.

Notary's Certificate Attached.

[Endorsed]: Filed March 10, 1959.

[Title of District Court and Cause Nos. 35332 and
35349.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled cases and constitute the record on appeal herein as designated by attorneys for the Appellants:

Case 35332

Excerpt from Docket Entries.

Complaint.

Answer.

Notice of Additional Defenses by Defendant.

Amended Complaint.

Stipulation re Answer.

35349—Civil

Excerpt from Docket Entries.

Complaint.

Answer.

Amended Complaint.

Stipulation re Answer.

35332-35349—consolidated

Memorandum for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Appeal Bond.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Appellants' Designation of Record on Appeal.

Reporters' Transcript of Proceedings Jan. 16 & 17, 1957.

Plaintiffs' Exhibits 1, 2, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16 and 17.

Defendants' Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, and T.

I Further Certify that Plaintiffs' Exhibits 3, 4, 5 and 10 and Defendants' Exhibit A, are not included

in this record for the reason such exhibits are not among the records in this office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 17th day of April, 1959.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ By MARGARET P. BLAIR,

Deputy.

[Title of District Court and Cause Nos. 35332 and 35349.]

REPORTER'S TRANSCRIPT

Proceedings of Trial

January 16-17, 1957

10:00 A.M.

Before: Hon. Oliver J. Carter, Judge.

Appearances: For the Plaintiffs: Oscar A. Mellin, Esq., and Jack E. Hursh, Esq. For the Defendants: Edward Gregg, Esq., and Robert G. Slick, Esq. [1]*

* * * * *

Opening Statement On Behalf of The Plaintiff

Mr. Mellin: If your Honor please, before that time, in order to simplify some of the testimony, that is to eliminate some of the issues and shorten

* Page numbers appearing at top of page of Reporter's Transcript of Record.

the trial, may I ask whether [4] or not the defense will stipulate that the plaintiff, Patriarca Manufacturing Corporation, is the exclusive licensee under the letters patent in suit?

Mr. Gregg: We will so stipulate, your Honor.

Mr. Mellin: I would also like to know if they would stipulate that the plaintiffs Domenico Patriarca and Donald A. Cameron are the owners of all the legal title to the patents in suit, that is, design 168288 and Domenico Patriarca is the owner of the title to 2,735,739.

Mr. Gregg: We will so stipulate. [5]

* * * * *

Mr. Mellin: I will offer Patent 2,735,739 as Exhibit 1 and Design Patent 168,288 as Exhibit 2.

The Court: Plaintiffs' Exhibits 1 and 2.

(Patent 2,735,739 was thereupon received in evidence and marked Exhibit 1, and Design Patent 168,288 was received in evidence and marked Exhibit 2.)

[See Book of Exhibits.]

* * * * * [13]

DOMENICO PATRIARCA

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

The Clerk: Will you state your name, your age and residence, Mr. Patriarca?

A. Domenico Patriarca.

Q. What is your age? A. Fifty-five.

Q. And your residence address?

A. 62 Seaview Avenue, Cranston, Ohio.

Direct Examination

Q. (By Mr. Mellin): What is your occupation, Mr. Patriarca? A. I am a cabinetmaker.

Q. What businesses have you followed, say, prior to the last [24] four or five years?

A. What type of business?

Q. What was your trade or profession?

A. It has always been a cabinetmaker. I have been in that all my life.

Q. And you are the Domenico Patriarca named in Patent No. 2,735,739 in suit, Exhibit 1?

A. Correct.

(Charts were placed on a blackboard.)

Q. Mr. Patriarca, do you recognize the enlargement on the left as a duplicate enlarged view of the Design Patent in suit? A. That is correct.

Q. And the one on the right is the duplicate of the other patent figure, Exhibit 1 in suit as to figures 1 and 2 of that patent?

A. That is right.

(Testimony of Domenico Patriarca.)

Mr. Mellin: May I offer those in evidence, your Honor, as next in order?

The Court: All right. Plaintiff's Exhibit 3 will be the enlargement of the Design Patent; Plaintiff's Exhibit 4 will be the enlargement of the Mechanical Patent.

(Enlargement of the Design Patent was thereupon marked Plaintiff's Exhibit 3, and the enlargement of the Mechanical Patent was Marked Plaintiff's Exhibit 4.) [25]

Mr. Mellin: May I have this cabinet on the right, your Honor, marked for identification as Exhibit 5?

The Court: You may.

(The cabinet referred to was thereupon marked Plaintiff's Exhibit 5 for identification.)

Q. (By Mr. Mellin): Mr. Patriarca, referring to Exhibit 5 for identification, you are familiar with that cabinet, are you? A. Correct.

Q. Is that the same or different in appearance, in your opinion, from the design shown in the Cameron Patent, Exhibit 2?

A. That is exactly the same with one exception. On that particular one they have a money rail in back there, especially at one customer's request.

Q. What I have my hand on? A. Yes.

Q. Does that change the appearance of the cabinet? A. No.

Q. To your knowledge were the patent drawings of the two patents in suit made for a cabinet the same as Exhibit No. 5 for identification?

(Testimony of Domenico Patriarca.)

A. Yes.

Q. Is this cabinet No. 5 for identification one of your manufacture? A. Yes.

Mr. Mellin: May I offer it in evidence, your Honor? [26]

The Court: It may be admitted in evidence as Plaintiff's Exhibit 5.

(Plaintiff's Exhibit 5 for identification was thereupon received in evidence.)

Q. (By Mr. Mellin): Mr. Patriarca, will you tell us the circumstances which lead up to the creation of this cabinet, Exhibit 5, as shown in the two patents in suit? Tell us first when was this creation accomplished, if it was a creation.

A. 1955, in the fall of 1955.

Q. I mean the invention of the patent in suit.

A. That is correct.

Q. '55 or '51?

A. '55. I beg your pardon.

Mr. Mellin: I did not mean to lead the witness. I knew he was in obvious error.

The Court: You had the right to do so.

Mr. Mellin: What occurred at that time, if anything?

A. I have been in the woodwork business all my life. I have done some work for Mr. Cameron in the past.

Q. What business was Mr. Cameron in at that time?

A. He is a druggist. He used to be in the drug business. From time to time I did some work in his

(Testimony of Domenico Patriarca.)

store for him. Among other things, prior to the fall of 1951, we made him a cigar case. The cigar case was one of the—well, I refer to it as the old-fashioned cigar case, conventional at the time, which [27] is nothing but a square box with glass on top and front and the cigars underneath. I lived close by together, and I used his drugstore for my home needs. I used to—sometimes I hesitated to go into it because he used to complain about the cigar case. He was happy about everything else we did but he complained about the cigar case. And he brought to my attention that the cigar industry needs something to revive, and he brought to my attention that he couldn't afford to allocate more room, but he still should have displayed more cigars. He brought to my attention some of the cigars, they were drying up. So we started to discuss the subject—

Q. When you say "we," you and Mr. Cameron?

A. Mr. Cameron and I. We went along and the subject intrigued me. And we finally—I went to the shop and I prepared some rough models. I called Cameron, Cameron came over, and we started to fool around, raise this, lower that with actual rough models. After I got through with the model and built the case I delivered it to Mr. Cameron's store and I forgot about it. Approximately ten days or two weeks later I get a call from Mr. Cameron, and frankly I thought he was going to kick about the price, just because just about that time he had the bill.

He started mentioning the case and he said,

(Testimony of Domenico Patriarca.)

"Well, Mr. Patriarca, you know this case—" and I was ready to explode because I didn't charge him any amount, any money for the time [28] it took to devise the thing; I merely charged him for the work involved to build the case.

"No," he said, "I was not referring to the cost. I am referring that I think this is something hot." He said, "The trade needs this very bad. I got about a dozen cigar salesmen and they are so enthused, I think we should patent it."

That is where that started. We went to the lawyer. We both signed some type of a petition, or we gave him the power of attorney, and that is how the business started, and that is the honest truth.

Q. Did you and Mr. Cameron work together on the design and the creation of this device we are talking about shown in the two patents?

A. Yes.

Q. After that, Mr. Patriarca, did you go into the business of manufacturing these cabinets?

A. We called the attention of a local cigar distributor, which was Costello. We had a talk with him—I mean to them—to find out what the possibilities were and what they thought of it, and so forth, and they seemed to think the thing was grand, the best ever that ever hit the cigar industry. So from that, I don't recall if Costello called Manning in Boston, which is forty-five miles away, or perhaps we might contact Manning in Boston, also a cigar distributor. Now, Manning called the Cigar Institute of America and told them he had something

(Testimony of Domenico Patriarca.)

hot. 29] The Cigar Institute of America directed Mr. Gene Raymond to fly from New York to Boston to take a look at the cabinet or the cigar humidor. As soon as he saw it he went wild. He was raving and full of compliments. He told me that they were having a convention, a cigar manufacturers convention in Atlantic City the following month or thereabout within a couple of weeks from the time we had this discussion, and he begged me to bring one cabinet to Atlantic City so that he could show it to cigar manufacturers. I told him I would, and we sent the cabinet to Atlantic City.

Q. When did you commence to commercially manufacture them?

A. I would say just about that time.

Q. That was when? A. 1951.

Q. Since that time have you continuously manufactured these cabinets?

A. Definitely. We give up general woodworking and we devoted our entire time to the cigar humidor.

Q. Those cabinets that you commenced to manufacture, were they the same or different than Exhibit 5 that is here? A. Exact.

Q. I hand you a paper which says "Sales of Self-Service Cigar Humidors." Can you identify it?

A. That is right.

Q. What is it? [30]

A. It is one thousand—

Q. I don't mean the number. What is the record? A. The record is a sales record.

(Testimony of Domenico Patriarca.)

Q. That is a sales record of the Patriarca Manufacturing Company? A. That is right.

Q. And you are for all practical purposes the Patriarca Manufacturing Company?

A. That is correct.

Mr. Mellin: May I offer this record in evidence, your Honor?

The Court: You may, Exhibit 6.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 6.)

[See Book of Exhibits.]

Mr. Mellin: This is a record of the sales of Patriarca Manufacturing Company of the cabinets shown in the patent suit, and if I may read it into the record, it states that in 1951 they sold 20 units, 1952, 303 units, 1953, 828 units, 1954, 883 units, 1955, 975, 1956, 1,042, for a total amount of \$1,360,424.25.

Q. Over what geographical area were those sold, Mr. Patriarca?

A. All over the United States, Alaska and Switzerland.

Q. Of your own knowledge do you know the approximate amount of money that you spent in advertising these humidors?

A. I would say in the neighborhood of \$60,000.

Q. Altogether? A. That is right.

Q. What about the first year, 1951? What would you say? A. 1951, about \$600.

Q. And 1952? A. 1952, about \$4,500.

(Testimony of Domenico Patriarca.)

Q. You told me the total amount spent yesterday, that you roughly calculated something in the order of 2% of the sales?

A. That is correct.

Q. What form of advertising did you employ? Catalogues?

A. Catalogues we gave to our distributors and trade magazines, just a small ad in the trade magazine.

Q. Do you have any salesmen out?

A. No.

Q. Did you ever have any salesmen out?

A. Just for maybe six months we had a man. We tried him out, but it wasn't a profitable venture, so we eliminated him.

Q. Did you or your company make any effort to determine whether the use of these patented humidors increased the sales of cigars or decreased them?

A. Yes, we made one survey in 1952. We did send out 200 letters. The first 200 people that bought cigar humidors. We asked various questions—if they were happy with the case, and if the case helped their cigar business, if they were sorry, if they sold the case, and so forth—and we had, oh, approximately [32] 48 responses out of 200, or 47.

Q. I hand you what appears to be a questionnaire on the letterhead of Patriarca Store Fixtures, Inc., December 8, 1952. Is that one of these questionnaire letters that you just referred to?

A. That is correct.

(Testimony of Domenico Patriarca.)

Q. As to the questions on it, the answers that appear and the markings, were the markings of whom? A. Of the retailer himself.

Q. And the one I'm handing you is out of a number of these you received back? A. Yes.

Q. Is it or is it not a typical response?

A. It is a typical response.

Q. That shows, of course, in there sales of 35% according to, of course, the retailer.

Mr. Gregg: Your Honor, I want to make an objection on the ground that the answers on this so-called typical letter are hearsay. If Mr. Mellin is offering this as proof of the facts indicated on the questionnaire, it is clearly hearsay and objectionable.

Mr. Mellin: If your Honor please, these questionnaires were sent out, and although it is not proof of the fact that they did increase their sales 35%, it is proof of the fact that they advised them it increased their sales to that extent. [33] With that limitation I offer it in evidence as a typical response to that questionnaire.

The Court: I will overrule the objection and it will be admitted in evidence for that limited purpose.

Mr. Mellin: For that limited purpose, your Honor, yes.

The Court: Plaintiff's Exhibit 7.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 7.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Mr. Mellin: I may tell the court I am offering merely a typical one because I have a summary of them.

Q. I also hand you what appears to be a recapitulation of the responses you received from these questionnaires, and I ask you to pay no attention to the bottom four lines, but ask you if you can identify the paper. A. Yes, I do.

Q. Will you state whether or not that is a recapitulation of what was given in answer to the questionnaires that you sent out?

A. That is correct.

Q. And gives the correct number of the questions sent out?

A. To the best of my knowledge.

Q. And it is accurate to the best of your knowledge? A. To the best of my knowledge.

Mr. Mellin: This is a recapitulation, your Honor, of the answers to the questionnaires received. [34]

Mr. Gregg: Your Honor, I would like the same ruling to apply to this exhibit, namely, it is not admitting as proving a fact that certain results were obtained by customers.

Mr. Mellin: That is not what it is offered for, your Honor. It merely shows what the answers to the questionnaires are.

The Court: What the same limitation it will be admitted in evidence as Plaintiff's Exhibit 8.

(The summary referred to was thereupon received in evidence and marked Plaintiff's Exhibit 8.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Q. (By Mr. Mellin): Will you state whether or not your company received any unsolicited letters commenting on the merits of this patented humidor? A. Hundreds.

Q. I hand you a group of one, two, three, four, five letters directed to your company and ask you if you received these letters in the due course of mail?

A. Yes.

Q. And you received hundreds of them?

A. Yes.

Q. Are these typical of those?

A. That is correct.

Mr. Mellin: I will offer these as our exhibits next in order.

Mr. Gregg: Your Honor, within the same limited scope [35] in connection with the previous exhibits—

Mr. Mellin: Is proof that the letters were received stating that, but not proof of the fact of what they state.

The Court: That is all right.

Mr. Gregg: Are you marking those?

Mr. Mellin: Yes, they may be offered in evidence.

The Court: The five letters will be admitted as Plaintiff's Exhibit 9.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 9.)

[See Book of Exhibits.]

(Testimony of Domenico Patriarca.)

Mr. Mellin: May I have the cabinet on the left marked for identification?

The Court: You may, Plaintiff's Exhibit 10 for identification.

Q. (By Mr. Mellin): Have you examined a cabinet marked Exhibit 10, or Exhibit 10 itself?

A. Yes.

Q. You are familiar with its construction?

A. That is correct.

Q. With respect to this accused humidor, Exhibit 10, will you state the differences, if any, and the similarities, if any, between it and the humidor disclosed in Exhibit 2, the design patent, as far as external appearances are concerned?

A. I would say it is the same.

Q. Would you say it is identical or different in any respect? [36]

A. I would say that every line, touch and twist, the thing is exactly the same.

Q. Have you examined the cabinet so far as its mechanical makeup is concerned, this humidor, Exhibit 10?

A. It is practically just exactly.

Q. You have examined it? A. Yes.

Q. Will you state the differences, if any, and the similarities, if any, between it and the cabinet construction shown in Exhibit 1, Patent 2,735,739?

A. I would say it is the same. However, there might be a little difference in workmanship and material.

(Testimony of Domenico Patriarca.)

Q. Well, did you measure the cabinet with respect to one of your commercial cabinets?

A. Yes, I would say that it's close to a fraction of an inch.

Q. In other words, it is right to the fraction of an inch? A. Yes.

Q. In length, width and height? A. Yes.

Q. You heard counsel tell the court that there was a difference between the mounting of the humidor in the patent Exhibit 1 and the mounting of the humidor in the cabinet or humidor Exhibit 10?

A. Yes.

Q. In other words, what is the difference in these mountings physically? [37]

A. Well, they practically amount to the same thing. It is elevated from the base.

Q. What is the reason for elevating it from the base?

A. To get better circulation and eliminate the rotting on the bottom.

Q. In other words, you raise it off the bottom to keep it from rotting and also for circulation?

A. Free circulation.

Q. The fact that in the patent it may be a little higher elevation wouldn't mean it would get just a little better circulation? A. That is right.

Q. Are there any other differences in structural features, I mean of any importance?

A. No, I would not say so. I think the cabinet—they couldn't make them closer if they tried.

Q. In view of the fact that you measured the

(Testimony of Domenico Patriarca.)

two and found their dimensions to be the same within fractions of an inch and their construction, and bear in mind also the fact that they do not elevate their humidor as high as it is shown elevated in the patent in suit, in your opinion as a cabinet-maker would you say one was a copy from the other? A. Definitely.

Q. Definitely, did you say? A. Yes. [38]

Mr. Mellin: May I offer the accused humidor in evidence as Exhibit 10?

The Court: It will be admitted in evidence as Exhibit 10.

(The humidor referred to was thereupon received in evidence and marked Plaintiff's Exhibit 10.)

Q. (By Mr. Mellin): Mr. Patriarca, referring to both cabinets, that is, Exhibits 5 and 10, will you tell us their advantages if they have any?

A. In my opinion, when I first started, I thought that particular cabinet will subdue the woodwork, which is what most of the fixture people do today. They try to subdue the cabinet itself and bring up, bring forward the display of cigars, and also it will display the cigars evenly and equally.

Q. By equally do you mean give every cigar—

A. The same break. The old cigar case, you will find the front row got all the play and the back row didn't get any show. That is usual. Then what we did accomplish was that prior to our cigar humidor every case made in the country was more or less—you could display twenty-four boxes in six feet.

(Testimony of Domenico Patriarca.)

Well, we increased the twenty-four to forty in the same amount of space. So we thought we would recover about thirty-five percent of the floor space, which was a very important item to the retailers. Next we combined the well-balance display, attractive, and we humidified the display [39] part in the storage compartment.

Q. The storage compartment is divided from the display compartment by this step perforated plate?

A. By the perforated metal steps.

Q. And that made the humidity equal all through the case?

A. Equal all through the case.

Q. What was the advantage of that, if any?

A. If we did work that perforated step idea, that couldn't be accomplished—I mean we could either humidify the display or we could humidify the storage, but we couldn't humidify both at the same time.

The Court: Without two units?

A. That is right.

Q. One unit you could humidify both sides with the perforated steps?

A. That is correct.

Q. (By Mr. Mellin): And that also concealed the humidifier?

A. That is right.

The Court: Mr. Mellin, when you come to a convenient point we will recess.

Mr. Mellin: I can stop right at this minute, your Honor.

The Court: We should take our morning recess.

(Testimony of Domenico Patriarca.)

We will go forward with this testimony after the recess.

(Recess.)

Q. (By Mr. Mellin): Mr. Patriarca, you testified about [40] catalogues, that your company Patriarca Manufacturing Company put them out. I hand you what appear to be catalogues and I ask you if these are the catalogues you refer to that were put out and the advertising cost that you had.

A. That is right.

Mr. Mellin: May I offer those, your Honor, as next in order as a group?

The Court: Yes. How many are there?

Mr. Mellin: Five.

The Court: They will all be admitted as one exhibit, Plaintiff's Exhibit 11.

(Catalogues referred to were thereupon received in evidence as Exhibit 11.)

Q. (By Mr. Mellin): Mr. Patriarca, have you read and are you familiar with Claims 3 and 4 of the Patriarca patent?

A. That is right.

Q. Will you state whether or not in your opinion those claims read precisely or not precisely on the accused humidior, Exhibit 10?

A. I would say they would be precisely.

Q. You heard it emphasized that in the humidior, the humidifier was located at a different elevation than it is in that patent.

A. That is right.

Q. But it is elevated above the base of the cabinet, is it?

A. That is correct. [41]

Q. That is in Exhibit 10?

A. Yes.

(Testimony of Domenico Patriarca.)

Q. Will you state whether or not your company gave written notice of infringement to the defendants here? A. Yes.

Q. What response if any did you receive?

A. First, they seemed to stall for some time and we kept sending more notices and they just didn't do anything. They just took the attitude that we had no patents.

Q. After those notices of infringement did the defendants Sosnick commence to sell the cabinet of a different design, that is, somewhat different from the ones that are before us here?

A. That is correct. Oh, sometime after three or four months he did—it came to my attention that he started to sell a little different style of cabinet—exactly the same, actually it is exactly the same cabinet, except he made some change in the front panel. He just cut backwards instead of slanting downwards.

Mr. Mellin: If the court please, may he produce some models and show what the change consisted of?

The Court: Yes, he may.

The Witness: Actually, instead of bringing the cabinet down this way, he cut it this way and came down.

Q. (By Mr. Mellin): Is that the only change you could see? [42]

A. To the best of my knowledge that is the only thing.

Q. Can you mark on Exhibit 3 on Figure 3 the

(Testimony of Domenico Patriarca.)

change that was made? In other words, cut out that little triangular piece? A. That is right.

Q. In your opinion was that a substantial or a trivial change?

A. I would say that it's a trivial change. I mean it doesn't do any less or any more than the other does.

Q. Now when you put out this patented humidor that we have been speaking of did any others prominent in the industry attempt to duplicate it?

A. Yes.

Q. I ask you to compile a list—you were asked by counsel on the other side actually to compile a list of what occurred in each one. Do you have such a list? A. That is correct.

Q. I will show you that list and ask you if it is a correct and a complete list of those which you had notice of, of making a duplicate of the patented cabinet, and that you notified or called their attention to the patents, and there are notations on here as to what occurred after the notice; is it correct to those degrees? A. That is right.

Q. I will hand you the list and ask you if that is the list you had prepared for me? [43]

A. Yes.

Mr. Mellin: I offer that in evidence, your Honor, as next in order. May I call the attention of your Honor that on this list there is McKesson-Robbins, who, when their attention was called to this patent, stopped and they sell the Patriarca humidor at this time. The same is true of the large Bowman Corpo-

(Testimony of Domenico Patriarca.)

ration of Grand Rapids, Michigan, the Wilkenson Company of Providence, Rhode Island, the United Fixtures of Providence, Rhode Island, the Modern Store Fixtures of Providence, and the others stopped infringement save and except—or said they were changing—save and except the defendant here and certain other customers, who were notified under the statute that permits of such notification.

The Court: It will be admitted into evidence as Plaintiff's Exhibit 12, that is, the list will.

(The list referred to was thereupon received in evidence and marked Plaintiff's Exhibit 12.)

[See Book of Exhibits.]

Mr. Mellin: Your Witness. Your Honor, I neglected to offer the file wrappers of the two patents in suit.

The Court: The file wrappers?

Mr. Mellin: The file histories.

The Court: You want to offer those in evidence?

Mr. Mellin: I would like to offer those in evidence. They should have gone in as one exhibit. May file wrapper in 2,735,739 be offered separately, and file wrapper of design [44] 168,288 as the next in order?

The Court: The file wrapper of the Mechanical Patent, that is, No. 2,735,739 will be admitted as Plaintiff's Exhibit 13, and Plaintiff's Exhibit 14 will be the file wrapper of Design Patent 168,288.

(The documents referred to were thereupon received in evidence and respectively marked Plaintiff's Exhibits 13 and 14.)

(Testimony of Domenico Patriarca.)

Cross Examination

Q. (By Mr. Gregg): Mr. Patriarca, one of the advantages of the cigar showcases that are in the courtroom, one of them marked as Plaintiff's Exhibit 5 and the other Plaintiff's Exhibit 10, one of the advantages of those showcases is that they are what are called self-service type of case, is that correct?

A. I wouldn't say that is primarily.

The Court: He said one of the advantages.

The Witness: Oh, yes, one of the advantages, yes.

Q. (By Mr. Gregg): Would you say it was one of the principal advantages? A. No.

Q. You call yours the Self-Service Showcase, don't you?

A. We happened to put the name that way.

Q. You do call yours the Self-Service Showcase? A. That is right.

Q. That is a particular quality that you advertise to the [45] public? A. Yes.

Q. You did not originate the Self-Service Showcase, did you, Mr. Patriarca?

A. That particular one we did.

Q. Did you originate first self-service cigar showcases?

A. I wouldn't know which one you are referring to.

Q. Let me put it this way: What do you under-

(Testimony of Domenico Patriarca.)

stand by self-service cigar showcase, and surely you must know since you call yours a self-server.

A. Repeat the question, please.

Q. Will you tell me what one means by the phrase "Self-Service Cigar Showcase"?

A. Self-service means you can help yourself.

Q. Instead of having a clerk reach around from behind you serve yourself? A. That is right.

Q. You were not the first person to develop and design and invent a self-service showcase, were you? A. I can't answer that.

Q. I think you answered it in your deposition given last week. Mr. Mellin, may I read from my copy of the deposition?

Mr. Mellin: You may.

Mr. Gregg: I am reading now from the deposition of Domenico Patriarca taken in this case on January 8, 1957, before [46] Rosemary Arnold, a notary public in the City and County of San Francisco. I am reading on page 10 of the deposition as follows, a question put by me to you:

"Q. Then you did not originate the self-service type of showcase, is that correct?

"A. I don't think so. I originated the particular one there."

Q. Are we agreed, Mr. Patriarca, that you, while you may have originated the particular cigar showcase in the courtroom, marked Plaintiff's Exhibit 5, you were not the first to originate a self-service cigar showcase?

A. I could not honestly answer that.

(Testimony of Domenico Patriarca.)

Q. But you did admit you did not in your deposition, didn't you?

A. Perhaps you might have caught me—I mean I am not very good in expressing myself. That is one handicap I have.

Q. You have been in the showcase business for thirty-five years; that has been your profession for thirty-five years, has it not?

A. I think woodworking has been my profession all my life. That is all I know.

Q. How long have you been in the cigar showcase business?

A. The cigar case business, we building fixtures, building a showcase before, we did build cigar cases as well. When we built a drugstore we had to build a candy rack, magazine rack, [47] wall cases, and also we built a cigar case.

Q. You have been in the cigar showcase business for many years; you are an old hand at it, is that correct?

A. I think so.

Q. As a matter of fact, you did not even originate the idea of sliding glass panels in cigar showcases, isn't that true, Mr. Patriarca? I am now manipulating Plaintiff's Exhibit 5. I am referring to the sliding glass panels. You did not even originate that feature, did you?

A. No, I did not originate the sliding panel.

Q. As a matter of fact, you did not even originate, in connection with cigar showcases—and again I am pointing to and referring to Plaintiff's Exhibit 5—you did not even originate the idea of steps

(Testimony of Domenico Patriarca.)

to support the cigar boxes; that is correct, isn't it?

A. In that particular case I did.

Q. I don't care what you originated in connection with that particular case, Mr. Patriarca. Were you the first person to employ the idea of steps to support cigar boxes?

A. In that particular manner we did.

Q. I am asking the question in general.

A. In general I couldn't answer that.

Q. So far as you know you originated the use of steps to support cigar boxes in a cigar showcase?

A. In that particular case, yes. [48]

Mr. Mellin: In that particular case you are talking about one of these?

The Witness: Yes.

Q. (By Mr. Gregg): Perhaps I can refresh your recollection somewhat by reading again from your deposition given last week, Mr. Patriarca. I am now reading on page 10 commencing at line 14:

"Q. Did you originate, you or Mr. Cameron or both of you, this feature of cigar showcases, a series of steps to support the cigar boxes?

"A. In that particular manner, yes.

"Q. What is the particular manner?

"A. The manner—the one in that particular case.

"Q. What is it? Describe it.

"A. Size, configuration, height, proportion and the amount of steps.

"Q. Can we put it this way, that steps were old,

(Testimony of Domenico Patriarca.)

but the particular height, configuration and shape were original with you.

“A. For that adaptation, yes.

“Q. Then you did not originate a step type of support but you originated a particular type of step support for cigar boxes?

“A. Well, you might call it that.

“Q. Do you wish to change your testimony in any [49] regard?”

Mr. Mellin: Just a moment. He is not changing his testimony. He is still saying these particular steps.

Q. (By Mr. Gregg): If you can't understand my question, Mr. Patriarca, please say so and I will try to rephrase them. I am now talking about the particular steps shown in Plaintiff's Exhibit 5; I am referring to steps in general.

Mr. Mellin: Disassociated from these cabinets.

Mr. Gregg: Disassociated from these cabinets, steps in a cigar showcase to support the cigar boxes:

Q. Had somebody got to that idea before you did? A. Not in that particular way.

Q. You have answered that question.

A. That is the only way I can answer.

The Court: What is the page of the deposition?

Mr. Gregg: The page of the deposition, your Honor, the last portion of it I read was page 10 of the deposition commencing at line 14 and ending on page 11 at line 1. The previous portion that I read in regard, I believe, to originating a self-service

(Testimony of Domenico Patriarca.)

type of cigar showcase was on page 10 of the deposition, lines 11 to 13. This is the Patriarca deposition.

Q. It is a fact, is it not, Mr. Patriarca, that you were not even the first to use a humidifier in connection with a cigar showcase, is that right?

A. No, I wasn't the first to use a humidifier.

Q. As a matter of fact, you were not even the first person to use what is variously described as an automatic or mechanical humidifier, is that correct?

A. No.

Q. During your examination by Mr. Mellin, Mr. Patriarca, you mentioned that the name Manning as a person who made some flattering remarks regarding your showcase. Do you know whether or not this gentleman Manning or his company sell any other line of showcases than Patriarca? A. No.

Q. You do not know whether he does or not?

A. To the best of my knowledge, no.

The Court: What do you mean by that? To the best of your knowledge you don't know?

A. I don't know if he sells any other kind of cases.

Q. (By Mr. Gregg): Now, Mr. Patriarca, you marked with a pencil Plaintiff's Exhibit 3, which is an enlargement of the drawing of Design Patent No. 168,288, and your marking indicated a change which was made after the notice of infringement was sent by you to the Sosnick Company. Do you know who made that change?

A. I do not know.

(Testimony of Domenico Patriarca.)

Q. You do not know whether the Sosnick Company made the change or not? A. No. [51]

Q. Or whether they were responsible for it or not? A. No.

Q. I direct your attention to Figure 1 of Design Patent 168,288 shown on the enlargement, Plaintiff's Exhibit 3, and to Figure 1 of Plaintiff's Exhibit 4, which is an enlargement of one of the drawings of the Mechanical Patent No. 2,735,739, and I ask you, those drawings are virtually identical, are they not? A. They are. [52]

* * * * *

Mr. Gregg: If your Honor please, you have on your left as you view it the cigar showcase which we will prove, when we put on our case, is a prior use and I would like to have it marked for identification as Defendants' Exhibit A.

The Court: Defendants' Exhibit A for identification.

(The cigar showcase referred to was thereupon marked Defendants' Exhibit A for identification.) [68]

* * * * *

Q. (By Mr. Gregg): Mr. Patriarca, it is a fact, is it not, that the customer coming into a cigar shop, liquor store or drugstore, some retail establishment selling cigars does not see the perforated metal step partition that is present in your showcase, isn't that correct? A. No, I wouldn't say so.

Q. Aren't the steps completely covered with boxes of cigars?

(Testimony of Domenico Patriarca.)

A. I wouldn't know. There is always a certain amount of space between boxes that can be seen. It is not actually displayed.

Q. I hand you a catalogue, which is one of a group of exhibits marked as Plaintiff's Exhibit 11, and directing your attention to the cover page, ask you if that is not the appearance of the cigar case to the cigar purchaser when he [78] comes into a store.

A. Will you repeat that question, please?

Q. Will you look at the cigar showcase shown on the cover of the catalogue which is in front of you, such catalogue being a group of exhibits marked as Plaintiff's Exhibit 11, and ask you if it is not correct, it is something like that which the cigar customer sees when he goes into a store?

A. Yes, that is true.

Q. Then a customer who goes into a store does not actually see the steps, isn't that right?

A. The steps can be seen.

Q. In other words, if the customer went to the trouble of removing some of the cigar boxes?

A. No, not remove the cigar boxes.

Mr. Mellin: If you look carefully enough.

The Witness: Yes.

Q. (By Mr. Gregg): Mr. Patriarca, are you aware of the fact that the cigar cabinets sold by the defendant Melvin Sosnick Company are not in fact manufactured by Melvin Sosnick Company but instead are manufactured by Rubenfeld Showcase Co.?

(Testimony of Domenico Patriarca.)

A. I learned that since I came up to the West. The Court: How is "Rubinfeld" spelled?

Mr. Gregg: Your Honor, it is R-u-b-i-n-f-e-l-d Showcase Company.

Q. You learned of that fact just within the last week or so, [79] isn't that correct?

A. That is right.

Q. I would like to hand you a letter. First I would like to exhibit it to counsel and have it marked for identification as defendants' next in order, B, I believe.

The Court: It is Exhibit B.

(The letter referred to was thereupon marked Defendants' Exhibit B for identification.)

Q. (By Mr. Gregg): I exhibit to you, Mr. Patriarca, Defendants' Exhibit B, which is a letter signed by Jack E. Hursh of the firm of Mellin, Hanscom & Hursh, dated July 30, 1956, directed to Eckhoff & Slick, Mills Tower, San Francisco, California, re Patriarca Mfg., Inc. versus Sosnick and Patriarca Mfg., Inc. versus Austruy, such letter outlining the terms of a proposed settlement of a case, and I direct your attention only to paragraph 5.

Mr. Mellin: Just a minute. By counsel's own statement this is a letter attempting to compromise this case and I think it is inadmissible.

The Court: It may very well be and it may not be. I do not know what the general rule would be that it would not.

(Testimony of Domenico Patriarca.)

Mr. Mellin: I will withdraw my objection. I see no point in the letter.

Q. (By Mr. Gregg): I direct your attention to paragraph 5, the last item in the letter, which reads as follows: [80]

“that Rubinfeld Showcase Company join in such settlement and abide by the terms thereof.”

I am not concerned at all, Mr. Patriarca, with the proposed terms of the settlement, but I direct your attention to that paragraph marked 5. How does it happen, Mr. Patriarca, that your counsel, Mellin, Hanscom & Hursh, in proposing a settlement of this suit on July 30, 1956, demanded as a condition of that settlement that Rubinfeld Showcase Company abide by the terms of the settlement? How do you reconcile that with your testimony just now that you learned only last week that Rubinfeld manufactured the cases that Sosnick puts out?

A. I don't know.

Q. Mr. Patriarca, apart from your apparent confusion about your knowledge of the relationship between Melvin Sosnick Company and Rubinfeld Showcase Company, quite apart from that, you did in fact know quite sometime ago that Rubinfeld Showcase Company does manufacture self-serving type of cigar showcases?

A. Yes, it came to our attention about, oh, I should say a year and a half ago or two years ago, I don't recall exactly, that Rubinfeld was making a

(Testimony of Domenico Patriarca.)

case similar to ours, and we have the correspondence, my attorney from Providence, and Rubinfeld had some kind of——

Q. Pardon me. I believe that is “Rubinfeld.”

A. I don't know exactly how it is pronounced. As a matter of [81] fact, I don't know how to explain it if I had to. So we corresponded back and forth, at least our attorney corresponded back and forth, and Rubinfeld I gave him a solemn promise that they were going to redesign the case and they were not going to make that case any more, and to the best of my knowledge he took for granted that Rubinfeld would start to make the case. That is why, even if it was called to my attention that they were still making the case, I still went on the assumption that he promised he would stop, cease making the case.

Q. Can you recall just about the time that you arrived at this assumption that Rubinfeld had quit manufacturing?

A. He wrote us.

Q. He wrote you?

A. Yes.

Q. Can you recall about when that was?

A. It was just about a year ago this time, because I remember at the time I came West, and that is just at the time Rubinfeld wrote back and said he was going to cease.

Q. You never followed up then, is that correct, Mr. Patriarca?

A. No.

Q. Isn't it a fact, Mr. Patriarca, that just about the last item of correspondence between yourself or somebody representing you on the one hand and

(Testimony of Domenico Patriarca.)

Rubinfeld Showcase Company on the [82] other hand was a letter notifying Rubinfeld that they were still infringing?

Mr. Mellin: Your Honor, this is even after the time this suit was filed. I do not see the relevancy of it, if he thinks there isn't any point in it.

Mr. Gregg: Your Honor, the relevancy is this——

The Court: He has not objected. I am not going to get into argument about it if he has not objected.

Mr. Gregg: I would like to have this letter marked for identification as Defendant's Exhibit next in order.

The Court: Defendant's Exhibit C.

(The letter referred to was thereupon received in evidence as Defendant's Exhibit C.)

[See Book of Exhibits.]

Q. (By Mr. Gregg): I hand you, Mr. Patriarca, Defendant's Exhibit C, which is a letter dated March 21, 1956, signed by Jack E. Hursh of the firm of Mellin, Hanscom & Hursh, directed to the Rubinfeld Showcase Company, 245 South Los Angeles, Los Angeles, California, and ask you to read it and see if you wish to change your testimony in any regard with respect to your assumption that Rubinfeld Showcase Company had quit manufacturing the type of case that you deemed to be an infringement.

Mr. Mellin: Is there a question pending?

Mr. Gregg: Yes. Will you read the question.

(Question read.) [83]

(Testimony of Domenico Patriarca.)

A. In January he did write to us and he said he was going to stop. For all purposes I thought he was. The chances are after that, maybe either by some other correspondence, but being perfectly frank with you I don't remember, but it is evident, it is there.

Q. Mr. Patriarca, Glaser Brothers is your exclusive representative in this area, are they not.

A. You couldn't call them exclusive because we have somebody else besides.

Q. Who else do you have?

A. McKesson-Robbins.

Q. There is an agreement between Patriarca Mfg. and Glaser, is there not, appointing them an exclusive distributor? A. Yes.

Q. Glaser Brothers is a cigar wholesaler, is it not? A. That is right.

Q. And they are in competition with Melvin Sosnick Company in the sale of cigars, is that correct?

A. I assume so. I am not acquainted with them.

Q. Don't you know that Melvin Sosnick is a cigar wholesaler? A. Yes.

Q. They are located in San Francisco?

A. Yes.

Q. And Glaser is located in San Francisco?

A. Yes. [84]

Q. Could you explain, Mr. Patriarca, since you have come from Providence, Rhode Island, about three thousand miles away, you have come all the way across the country to sue someone on a patent,

(Testimony of Domenico Patriarca.)

why is it that you have sued Melvin Sosnick Company, a cigar wholesaler, instead of the manufacturer Rubinfeld Showcase Company? [85]

* * * * *

A. I came about January 15th of last year or thereabout. It [87] might be a few days before or after. I came to San Francisco because I was informed that Sosnick Company was selling cases similar to mine. I came over here and I saw three installations with my own eyes. I was satisfied there was an exact infringement, at least in my own mind. I told my attorney to advise them. They first stalled as long as they could, and then practically told us we didn't have no patent, no leg to stand on, so they are going right ahead and do what they want. At least that is the way I understood it.

Q. (By the Court): Do you have anything to say about why you have not, if you have not, sued the Rubinfeld Showcase Company?

A. Well, I felt that if we sue one, and if I had to go and sue Rubinfeld, I had to go to Los Angeles, and I don't intend to spend the rest of my days in court. I got a living to make. [88]

* * * * *

Q. (By Mr. Gregg): Mr. Patriarca, I direct your attention to a feature of the cigar showcase which you manufacture known as Plaintiff's Exhibit 5. I direct your attention to this slope.

The Court: You have to use a case or can you use the diagram up here?

(Testimony of Domenico Patriarca.)

Mr. Gregg: I can use the diagram, your Honor. I think that is a good idea.

Q. I direct your attention to Plaintiff's Exhibit 3, a large drawing of Design Patent 168,288, and I further direct your attention to the sloping lower front wall, to which I will apply the reference character X. What is the advantage of that lower sloping front wall.

A. Well, it has quite a few advantages. The first, it improves the symmetry, the balance, and does subdue the woodwork and bring out the display of merchandise.

Second, you can get close to it, much closer, to make your selection instead of kicking the woodwork. [89]

Q. Having regard to the change which was made in the cabinet that the Sosnicks have sold, namely, extending it back horizontally and then down vertically, would that improve your appearance and, I forget your phrase, something like subduing the wood? A. No.

Q. It would not?

A. I mean—excuse me—it does practically the same thing actually, because the display remained the same and you could still get close and the general appearance is still—

Q. Mr. Patriarca, apart from any pleasing design aspects of that lower sloping front wall, the only practical advantage is, is it not, that it just permits the customer to get closer and put his feet under the cabinet?

(Testimony of Domenico Patriarca.)

A. That is one of the features. [90]

* * * * *

Q. (By Mr. Gregg): If I can refresh your recollection, you apparently made your invention in September, 1951. I am not asking you to state that. That is in the record. A. Yes, 1951.

Q. I am speaking about prior to that time, and prior to the time that you got into production on this type of case you sold a negligible amount of cigar showcases?

A. Yes, I would say in the neighborhood of fifteen through the balance of 1951 and 1952 and in the year 1950.

Q. I thought, Mr. Patriarca, that you had been in the showcase business, including the cigar showcase business, for about 35 years.

A. That is correct.

Q. During those 35 years up until about 1951 you sold only ten or fifteen showcases?

A. That is correct.

Q. Not very much business then.

A. No, I wouldn't say that. In other words, we used to do a general store fixture work, and when we built the store, we included the cigar cases.

Q. Altogether prior to 1951 in your 35 years of experience [92] you had sold only about ten or fifteen cigar showcases? A. Yes.

Q. You testified, I believe, you had sold since you came out with the self-service cigar showcase about 4,000 of them, sold them throughout the country? A. Yes.

(Testimony of Domenico Patriarca.)

Q. You know how many cigar showcases there are in the United States? A. No.

Q. Do you know how many cigar retailers there are in the United States?

A. I used to know at one time.

Q. I have heard the figure of 2,000,000. Does that sound out of line? A. How many?

Q. 2,000,000 cigar retailers?

A. It could be that many. I don't think there were that many but it is a large amount.

Q. Since 1951 to date, a period of about six years, you have sold 4,000 cigar showcases; you have sold to certainly not in excess of 4,000 cigar retailers, is that correct? Some of them might have bought two showcases, is that correct?

A. There might—a few people, they might have bought them all in one.

Q. Do you know anything about the sale, and I am speaking now, [93] Mr. Patriarca, of the period 1951 to the present time, do you know how many cigar showcases have been sold during that period by your competitors throughout the country?

A. No.

Q. You do not. They might have sold a great many more than you?

A. I don't believe so.

Q. You do not think that throughout the country more than 4,000 cigar showcases have been sold in the last six years.

A. At the least I don't think so.

Q. I would like to ask you a few questions, Mr.

(Testimony of Domenico Patriarca.)

Patriarca, with regard to a list of concerns which according to your testimony at one time were imitating your cigar showcases, but they have mended their ways since. I refer to Exhibit 12, McKesson-Robbins, No. 1 on the list, do they sell locally in San Francisco? A. Yes.

Q. With regard to McKesson-Robbins, do you know whether they sell any other cigar showcases than the Patriarca? A. I don't think so.

Q. You do not believe so but you do not know?

A. I wouldn't swear to it.

Q. With regard to the Bowman Corporation of Grand Rapids, Michigan, according to the exhibit, they stopped the infringing and now sell the Patriarca humidor? [94] A. Yes.

Q. Do you know whether Bowman sells any other line of cigar showcases?

A. To the best of my knowledge not.

Q. But you do not know for sure?

A. I have not——

Q. What is the Bowman Corporation?

A. It is a national fixture house.

Q. It is a fixture concern?

A. A fixture concern, yes.

Q. The Wilkinson Company No. 3, what business are they in?

A. Same thing, the fixture business.

Q. Do you know whether they sell any other showcases than the Patriarca humidor?

A. I don't know, to be frank with you. They might build some other type of case themselves, but

(Testimony of Domenico Patriarca.)

when it come to that type of case they buy from us.

Q. Here is one close to home, United Fixtures, Providence, Rhode Island, Wilkinson was also in Providence? A. Yes.

Q. What about them? Do they sell any other line?

A. They do not sell any other line, but I don't say they might not make a conventional case now and then if it is required.

Q. You think they might sell some of their own manufacture? [95]

A. Yes, but not the same type of a case because there wouldn't be any sense for them to buy from us.

Q. No. 8 on the list, Plaintiff's Exhibit 12, was the Royal Showcase of San Francisco. Is it your position that they were notified of infringement and stopped manufacturing?

A. To the best of my knowledge I would say they did stop. They promised to stop.

Q. Do they put out any other type of showcase?

A. I imagine they do. They make other types of cases and they make a conventional cigar case. I mean I assume.

Q. Do you know whether they put out some showcases of the type we are looking at, to my right and to the Court's left, which is Defendant's Exhibit A?

A. I have seen the case there. I don't know whether it is manufactured by the Royal Showcase.

(Testimony of Domenico Patriarca.)

Q. You do not know whether Royal Showcase manufacturers that? A. No.

Q. Do you know the Madison Drug Company?

A. Madison Drug?

Q. Madison Drug Company.

A. In San Francisco?

Q. I don't know where they are located. I just have the name Madison Drug Company.

A. I don't recall.

Q. Do you know a J. B. Withers in Atlanta, Georgia? [96] A. Withers? Yes.

Q. Do they ever put out a case like yours?

A. To be perfectly frank, I haven't seen the case they put out. I understood they did put a case out like ours. We had a talk with DeWitts of the main branch and they seemed to agree that they would undertake to sell our case. A lot of the branches they do sell our case. I wouldn't say that all branches sell their cases or they sell our case, but a lot of them, DeWitt's branch, which is part of this Withers.

Q. How about the H. W. Shore Company of Wooster, Massachusetts?

A. H. W. Shore, they came out with a case similar to ours. We notified them and to the best of my knowledge, since we notified them, one of their branches, which I should say is about 35 to 40 miles away—it might be 50—which is the New Haven branch, has sold more cases during that time than any other previous time before.

(Testimony of Domenico Patriarca.)

Q. What are they selling now, do you know?

A. They are selling our case.

Q. Your case? A. Yes.

Q. And no other?

A. Well, now, that I am not sure.

Q. Did you ever notify them of an infringement?
A. Yes. [97]

Q. They are not on this list, Plaintiff's Exhibit 12, are they? I will hand it to you.

A. I thought I had it. Yes.

Q. Where is it? A. H. E. Shore.

Q. H. E. Shore? A. Yes.

Q. Perhaps that is the source of confusion. I understood the name was Shaw. The name is Shore, is that correct?
A. Yes.

Mr. Gregg: I think that is all, your Honor.

The Court: Mr. Mellin, how much longer will your redirect be?

Mr. Mellin: Two or three minutes.

The Court: Go right ahead.

Mr. Mellin: Your Honor, I have in front of me the remainder of the correspondence regarding this Rubinfeld matter, including a copy of the letter that was sent us, inasmuch as this was our correspondence from Elliot A. Salter, who is of Frucht and Salter, patent lawyers, Providence, Rhode Island, and a letter from the attorneys for Rubin-

(Testimony of Domenico Patriarca.)

feld of April 10, 1956, a copy of the letter being from Rubinfeld's attorney dated January 8, 1956. May I offer the documents to complete the correspondence in this matter?

The Court: Has counsel seen it yet? [98]

Mr. Mellin: Yes. That completes the correspondence.

The Court: As one exhibit?

Mr. Mellin: As one exhibit.

Mr. Gregg: If it please the Court, I wonder if we could stipulate that there is one exhibit which is a letter from——

Mr. Mellin: Sidney R. Rose of Flam, Valensi & Rose, who are the attorneys for Rubinfeld.

Mr. Gregg: No, I am mistaken about that. Go right ahead.

Mr. Mellin: These show that even on April 10, 1956, the time when Rubinfeld, after they made the change, they still said they did not infringe. That was long after the filing of this suit.

The Court: These three letters will be marked Plaintiff's Exhibit 15. Proceed.

(The correspondence referred to was thereupon received in evidence and marked as Plaintiff's Exhibit 15.)

[See Book of Exhibits.]

Redirect Examination

Q. (By Mr. Mellin): Mr. Patriarca, do you have any interest in any cigar business as such?

(Testimony of Domenico Patriarca.)

A. None whatsoever.

Q. Does any of your associates have any, such as Mr. Cameron? A. None whatsoever.

Q. Do you have any interest whatsoever in the cigar business of Glaser or his associate companies?

A. None whatsoever. [99]

Q. In other words, as I understand it, your only business is selling cigar cases?

A. That is correct.

Q. To clear up apparently what was confusing you this morning, I think, Mr. Patriarca, if you take these steps, or just ordinary steps, such as in the case of Mr. Gregg out of your case and put them in some of the commonplace, heretofore used cases, that was done before you made your invention, wasn't it?

A. As far as the steps, I think as a whole, that is as old as man himself because we use steps to climb stairs.

Q. That is also true of cabinets that permit somebody to serve themselves? You did not invent that particular principle? A. No.

Mr. Mellin: That is all.

Mr. Gregg: No questions, your Honor.

The Court: Will you step down?

(Recess)

Mr. Mellin: We will call Mr. Glaser.

The Court: Mr. Glaser, step forward and be sworn, please.

MARCUS GLASER

was called as a witness on behalf of the plaintiff, and being first duly sworn testified as follows:

The Court: Before you start examining this witness I might [100] say to both counsel that I am personally acquainted with this witness and have known him for a number of years. However, I have no business relations with him or anything of that sort. I want both counsel to be advised. I know Mr. Glaser and have known him for a number of years.

Direct Examination

Q. (By Mr. Mellin): State your full name for the Court and the record.

A. Marcus Glaser.

Q. Your age? A. 57.

Q. And your residence address?

A. 1100 Sacramento Street.

Q. What is your occupation?

A. President, Glaser Brothers.

Q. Do you also have another company?

A. Yes, sir.

Q. What is the business of Glaser Brothers?

A. The business of Glaser Brothers is whole-sale cigars, tobacco and cigarettes.

Q. What is the name of the other company?

A. We have many other companies. The other company you are referring to is the Frawley Tobacco Company.

(Testimony of Marcus Glaser.)

Q. You are for all practical purposes the Frawley Company, a tobacco concern?

A. Yes, sir. [101]

Q. How long have you been in business?

A. All my life.

Q. You are active and have been active for many years in that business? A. Yes.

Q. Over what territory do you distribute cigars?

A. The states of Oregon, Nevada, Washington and part of Idaho.

Q. How long have you been distributing cigars over that area?

A. Practically speaking, we have been in business since 1888. We have been in California in the City of San Francisco since that time. Our first branch was in 1912. We expanded in 1919 out of state for the first time, and from there on we grew.

Q. Is one of your companies the distributor of plaintiff's humidors? A. Yes, sir.

Q. For how long?

A. I think since 1953, if I am not mistaken.

Q. And those cabinets I refer to, they are like or unlike Exhibit 5?

A. This is the cabinet, Exhibit 5.

Q. How did you happen to become the distributor of this cabinet?

A. I was in the tobacco convention at Atlantic City, and in walking through some of the exhibits I came across this [102] particular cabinet. To me it represented the acme in cigar display and distribution, ability to keep the cigars moving, the

(Testimony of Marcus Glaser.)

cure-all—it was a cure-all for the cigar business, as I saw it, from the standpoint of consumer display and sales. I met a Mr. Cameron there and asked him how much the case was. He told me and I told him I didn't think anybody could see a cigar case for that price. I said, however, I would like to talk to you about it.

Mr. Cameron afterwards came out to see me and we took the cigar case on through the Frawley Tobacco Company, not through Glaser Brothers.

Q. And they sell the case actually to the retailers?

A. The case is sold—Glaser Brothers is not in the fixture business. We are in the cigar, tobacco and candy business. When it comes to fixtures or anything that requires any length of time, we try to divorce it from the regular Glaser Brothers setup. So we put this in the Frawley Tobacco Company, which allowed them to sell to everybody.

Q. Then you have been selling these Patriarca patented cabinets since about 1953, did you say?

A. Yes, sir.

Q. Did you cause a compilation of the sales, both in numbers of cabinets and in dealer value, to be made up for you?

A. Yes, sir.

Q. I hand you such a recap or compilation and ask you if that [103] is it?

A. This is it.

Q. And that shows the total sales by your company since that time of \$265,314.95; that is correct, is it?

A. Yes, sir.

(Testimony of Marcus Glaser.)

Mr. Mellin: I will offer that recap and the sales, your Honor.

The Court: Plaintiff's Exhibit 16.

(The recap referred to was thereupon received in evidence and marked Plaintiff's Exhibit 16.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): Prior to the time that you became the distributor of this Patriarca display humidor, what had been your experience with reference to humidors, of this kind for this purpose?

A. Well, I have been in the cigar business practically speaking working at it since 1917, working both for the manufacturer as a peddler, distributing as a peddler, and also working for Glaser Brothers, and the problem in the industry was always to get a case that would do three of four functions. Where you could always get two or three you couldn't get a fourth one. No matter what you did there was always something missing. When I saw this case I decided that it had everything that was asked for. I had tried to sell—I built cases before. I have gone to special shops and ordered cases for dealers, had them built, I talked to display men and tried to fool around [104] with the cases to see what could be done, but none of the cases answered exactly the problem of this industry, and when I saw this Patriarca case I thought we had hit the jackpot on it.

Q. Do you know whether or not the sale of the cases that you had made have increased or decreased the sale of cigars in your area?

(Testimony of Marcus Glaser.)

A. I can't say positively that we have increased the sale of cigars in our area through the sale of cigar cases, but I would say our sales have increased perceptibly since 1953. I can say that we sell this case under a rigid guarantee to the dealer. It is verbal but it is still a guarantee, that any time a dealer puts it in and he can't show a 30 per cent increase in his business, in a cigar department, if he places it correctly, according to what we ask, we will give him the case.

Q. Can you state whether or not those to whom you have sold cases have increased their cigar sales?

A. Our comparative figures showed an increase of about 51 per cent.

Q. From your records you are able to determine this, were you? A. Yes, sir.

Q. How did you do this?

A. I had one of our auditors, I had our head auditor take off a three month period, before and after, and we produced the figures based on 25 per cent of the cases we sold in the year [105] 1955.

Q. In other words, you picked all the sales of cases during a certain period?

A. During a certain period.

Q. And then checked those against the cigar sales to the retailer prior to and subsequent to that time? A. Yes, sir.

Q. I hand you a compilation which is entitled "Comparative Value of Cigars Delivered to Patriarca Purchasers." Is that the compilation you refer to? A. Yes, sir.

(Testimony of Marcus Glaser.)

Q. That you had your auditor make?

A. Yes, sir.

Q. And that shows an average increase to all of those to what extent? A. 51.63.

Mr. Mellin: I will offer that in evidence, your Honor, as next in order.

(The compilation referred to was thereupon received in evidence and marked Plaintiff's Exhibit 17.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): As I understand it, from the evidence that has gone in from you, you have sold something over 600 cases in this area in which you deal over the past three or four years. Do you know of any instance, Mr. Glaser, in which the installation of the Patriarca case failed to increase the [106] retail sale of cigars?

A. I do not know of any instance where it failed to increase. There are some cases on record there where it was only 12 or 18 per cent, and we have studied the matter over, went down to the dealer, and by moving the case around and putting it in a more vulnerable position to display, we have brought that back up to where it should have been.

Q. What were the shortcomings of these prior cases that you have spoken of, that you said they had prior to this Patriarca case?

A. A cigar case must have a few advantages that are not given lightly to anybody. Number one, cigar business is not what you would call an increasing business in today's economy, though it

(Testimony of Marcus Glaser.)

shows an increase of two per cent over-all. In 1933, which was a slow point, there were four billion cigars sold; today there is six billion five hundred million. That is the 1956 figures. And one of the reasons for it is a lack of proper display in show-cases and the lack of proper conditioning for cigars. If a cigar is dry, you not only lose a customer for your cigar but you lose a customer for the business. It is bitter, it is harsh, it doesn't smoke properly. If a cigar is fresh and in good condition it tastes and smells sweet, smells like tobacco, doesn't have the harsh odor. A cigar must be fresh. Not only that, the average case we have seen up to this point—— [107]

Q. By "up to this point" what do you mean?

A. Up to the point I have seen this Patriarca case, the average case we had seen and the ones I have built even—and I think I have built a great many cases—and by many, 100, let us call it that, for round numbers—we found the space that it took up was so great you couldn't get adequate display, and at the same time produce and keep a fresh humidification of cigars, and keep the cigar either from becoming too fresh and getting soggy, as we call it, with a mold on it, or becoming dry.

The average cigar box is one foot—approximately you must allow one foot in a case for a cigar box as an average. To put 50 boxes in a case, or 40 boxes, as you see there, would require in this case about 6 and a half or 7 feet. I don't know the exact measurement, but that is approximately what it is. To do

(Testimony of Marcus Glaser.)

it in a regulation case of 3 steps or a regulation case that had been built in the past without the mass display and the functional use of this case, which this design alone gives, a mass impression, which is today's modern merchandising, mass impression without giving this you lose the effectiveness by spreading it out. A man sees nothing.

Then in addition to this, if it is not so located, it does not strike the eye when it comes in, if it is not built up so people can see, if it hasn't the attractiveness to make a man want to buy, you lose a cigar sale, because most of cigar sales [108] are what you call point of sale purchases. Now, this case answered all of those problems, as I saw it. Not only that, it answered the most difficult problem of all. When the dealer bought a quantity of cigars, where was he going to put them? What was he going to do with them? Stick them in the back and then put them in the case when they are all dry? He would put them underneath of the case. The case was humidified. The case was in good condition. All cigars taste fresh. Everything about the case was clean. In addition he could lock the case at night time if he wanted to. He could do many things with it. And we increased high grade cigar business 25 per cent above the national average since 1953, and I attribute a great deal of it to the Patriarca case.

Q. Have you ever seen a case like this before?

A. Yes, sir.

Q. You have seen a case?

(Testimony of Marcus Glaser.)

A. What case?

Q. What case?

A. The one standing over there?

Q. I mean prior to the time you saw the Patriarca case.

A. I have never seen in my time in the cigar business, I had never seen an identical case to this case, or what I would consider, instead of identical, if I may use the word similar—I have never even seen a similar case. Though many people have tried to make displays, this man created something that [109] could be—, anybody could imitate it, sure, because since the four-minute mile was broken, there have been other guys who have broken it. Since you broke the sound barrier, others have broken it. But one man had to come into this industry and give us the background and give us a case that looked to be like this.

Q. From the sale of the case itself do you make much of a profit?

A. We make practically no profit.

Q. Why do you still distribute them?

A. Because they increase the sale of cigars. They help the cigar business. They are good for the cigar business, and what is good for the cigar business is good for this company.

Q. When the Frawley Company, or whatever company sells these cases, sells them to customers, is it your practice to give away free cigars to put in the case?

A. We don't give away anything. We made ar-

(Testimony of Marcus Glaser.)

rangements with the manufacturers with whom we do business, and some with whom we do not do business. Where we do business with the manufacturer, we go in and give the man, to help him reduce the cost of that case, because it is a very expensive case for a little retailer to put in—it is three, four, five or six hundred dollars—this is an expensive case, it isn't cheap—we make arrangements with the manufacturer, who is given the privilege of putting in free cigars in a man's case. At the same time we do this we notify other manufacturers. At one [110] point they used to let us put their own cigars in. Later they felt they were losing something. They weren't able to go around and say, "We gave it to you instead of Glaser Brothers." It isn't our franchise brand. So they went around and gave it to the dealer themselves. The manufacturers are notified and they make arrangements to give whatever cigars they want in those cases.

Q. Is that sort of arrangement unusual in the cigar business?

A. In our particular case anything could be unusual, but in the sale of Patriarca cases throughout the East it was recommended by the Cigar Institute of America of which I am a member. It is in conjunction with the Cigar Manufacturers Association, and they give, wherever Patriarca puts in a case, they give a certain amount of free goods to the retailer in the cases. It is an effort to get the dealer to take a further interest in selling fresh cigars, well displayed and well humidified.

(Testimony of Marcus Glaser.)

Q. What sort of discount does that give the purchaser of one of these cases presently?

A. I think that the facts will speak for themselves. It isn't a discount. We have a schedule and everybody knows the schedule. It is open; isn't closed. That schedule is open to everybody.

Q. Even with the value of the cigars given away does that case still cost the retailer more than the Sosnick case or not to [111] your knowledge?

A. To the best of my knowledge a great deal more, sir, and the dealer pays money for it.

Q. In any instance do you require when you sell one of these cases to the retailer that they display only your brands or the brands that you are handling?

A. This case is sold with the understanding that it is the dealer's property. We ask him and we get, because we have installed this in usual manners, we say, "Please give us 30 to 60 days, leave our cigars there, see how they sell, and if they don't sell we'll pick them up and take them back." Once a man buys that case it is his. He can say, "I am sorry but there is nothing we can do about it." There is nothing in the conditional sales contract that requires him to display our cigars.

Q. Did you ever require it to your knowledge?

A. No, to the best of my knowledge, and if I found anybody who did I would dismiss him from the organization.

Q. Did you ever offer to sell these cases to the defendant Sosnick?

(Testimony of Marcus Glaser.)

A. I have offered to sell that case to Mr. Melvin Sosnick. I have tried to sell that case to every distributor on the West Coast. I have made it public that I would do so. But I personally have told that to Mr. Sosnick myself.

Mr. Mellin: Your witness. [112]

The Court: Cross examine.

Mr. Gregg: Your Honor, I would like to file the deposition of Mr. Glaser taken last week. Mr. Mellin, may we have the same stipulation?

Mr. Mellin: Certainly.

The Court: The deposition may be filed.

Mr. Mellin: Before he commences may I ask one question?

The Court: Yes.

Q. (By Mr. Mellin): Did you ever advertise this humidor, this Patriarca humidor?

A. What do you mean advertise it?

Q. Did you advertise it ever?

A. Certainly, I have spent money on it.

Q. How much?

A. I don't know. We give away two or three cases a year. Last year I gave a case to the retail liquor dealers in San Diego, I gave one away to the retail grocers. We give away one to the retail druggists association.

Q. At conventions?

A. At conventions as door prizes.

Q. Do you advertise in journals and things of that sort? A. No.

Mr. Mellin: That is all.

(Testimony of Marcus Glaser.)

Cross Examination

Q. (By Mr. Gregg): Mr. Glaser, you are the exclusive representative throughout [113] the states of California, Oregon, and Washington of Patriarca Manufacturing Company, aren't you?

A. After a fashion.

Q. Will you qualify that and explain the qualification?

A. The McKesson Drug Company also have that case. They sell it along with their fixture account. Just lately here one of the fixture people wanted a case and it was sold to them.

Q. But most of the Patriarca cases sold in those three states are sold through the Frawley Tobacco Company?

A. Yes, sir.

Q. You own the Frawley Tobacco Company?

A. Yes, sir.

Q. And you also own the Glaser Brothers?

A. Yes, sir.

Q. In Plaintiff's Exhibit 16, for the period 1953 through 1956, a period of four years, the total sales of cigar cases amounted to \$265,314.95; you may check me if you wish.

A. Whatever the paper says, it speaks for itself.

Q. Proportionately about how does that compare with the dollar volume of cigar sales of Glaser Brothers?

A. I don't think it is relevant.

Q. Could you answer that?

A. I don't see why I should.

(Testimony of Marcus Glaser.)

Q. No objection has been made.

Mr. Mellin: I will object. What difference does it make [114] how many cigars he sells? That is not an issue here. What is the total sales of cigars?

The Court: Is that what you are after?

Mr. Gregg: I do not care about the total sales of cigars. I want the ratio between the dollar volume of showcase sales, the dollar volume of cigars as against the dollar volume of showcase sales.

Mr. Mellin: That is like comparing bananas with chickens.

The Court: What is the relevancy?

Mr. Gregg: The relevance is this: We believe the motive in filing this suit is to protect the sale of cigars and not the sale of showcases.

Mr. Mellin: If your Honor please, if he wants to know the number of cigars sold here, we have given the value on that list.

The Court: I understand. Can you give that ratio, Mr. Glaser?

The Witness: Will you restate your question?

The Court: He wants to know the ratio of dollar volume of cigars to the dollar volume of sales.

Mr. Gregg: For the period indicated, 1953 through 1956.

The Witness: Well, I am here to help Mr. Patriarca in this suit. As long as you have asked the question, I will give the answer. I can't give it to you in percentage. I don't know. But our cigar volume represents somewhere between 17 and 20 mil-

(Testimony of Marcus Glaser.)

lion dollars. [115] The exact figure I refuse to give you. I think that is satisfactory.

Q. (By Mr. Gregg): That is sufficient. Your main purpose in selling the Patriarca showcases is to stimulate the sale of cigars, is that correct?

A. Yes, sir.

Q. In the states of California, Oregon and Washington Glaser Brothers is the dominant and largest cigar wholesaler, is that correct?

A. I wouldn't say that 100 per cent.

Q. Well, let us take California.

A. In the State of California we are the largest cigar distributors all over the state, though there are locations where other people are stronger than we are.

Q. What about San Francisco? What is your relative position?

A. I don't know what anybody else is doing, so anything I would say would be a matter of conjecture.

Q. What would be your conjecture with regard to San Francisco, your relative position in the sale of cigars?

A. I think we are number one. We are supposed to be number one in the United States, if that will answer all your questions on that subject.

Q. That is sufficient. A. All right.

Q. It is a fact, isn't it, Mr. Glaser, in the last few years [116] there has been a great deal of advertising, national advertising by the cigar industry and by some of the companies in the cigar

(Testimony of Marcus Glaser.)

industry; by "national advertising" I refer to TV and other forms of nationwide advertising, isn't that correct? A. I suppose so.

Q. Don't you know?

A. I don't know. Do you?

Q. You asked me the question. I see it on the fight programs. A. That's right.

Q. They advertise Santa Fe cigars, isn't that right?

The Court: It is a rather indefinite question. I think that is what Mr. Glaser is referring to. Counsel, I do not want this to get into an argumentative proposition between you and the witness and, Mr. Glaser, you answer the questions and don't question counsel.

The Witness: Yes, sir. All right, sir.

Q. (By Mr. Gregg): To what extent have increased cigar sales, as shown by Plaintiff's Exhibit 17—I will hand you my copy of that—to what extent would you say increased cigar sales have been due to national advertising of cigars?

A. Well, if I may digress to answer that, in the cigar business the total increased sales for last year was approximately two per cent. This took in all facets of the industry. The increased sale on the West Coast has been thrown slightly out of kilter, and the relative position of its increase has [117] been thrown out of kilter because of the tremendous influx of population for which allowances cannot be made because we are not close enough up with them. So if we have increases here that are

(Testimony of Marcus Glaser.)

far greater than the national average—and we have—some of it must be given to this influx of population. Some of it must be given to the fact that we have a greater cigar-smoking public in the West than we have in the South. It is axiomatic in the business that the higher the wage scale the more cigars are smoked. It is also axiomatic in the business that the more people who are in the fresh air smoke cigars than those who are in closed offices. This is part of a picture. I cannot give you the exact total. I don't know. But Glaser Brothers—and these cases have shown remarkable improvement over and above our own increase. Well, we have increased perceptibly in our business, and these cases, where they have been put, have increased greater than Glaser Brothers increase. I hope that will answer your question.

Q. Mr. Glaser, with regard to the locations where Patriarca showcases have been installed, and according to the data set forth in Plaintiff's Exhibit 17, comparing the prior 90 day period with the subsequent 90 day period, in those cases I would like you to shed some light and information on this question: Was there any change in the brands of cigars displayed before and after the commencing of the test period?

Mr. Mellin: Change in brands? [118]

Mr. Gregg: Change in brands?

Q. Take, for example, to pin point it, the first item in Plaintiff's Exhibit 17 is for San Francisco. The period is the 2nd of June to the 1st of Au-

(Testimony of Marcus Glaser.)

gust. There were three units installed. Prior to the time they were installed, if I am interpreting this document correctly, prior to the time they were installed \$1,173.75 worth of cigars were sold. During the 90 days after the case was installed \$2,035.81 worth of cigars was sold. In those particular instances, in San Francisco, three units—and I will hand you my copy of the exhibit—were there any changes in the brands of cigars?

A. Let me answer it to the best of my ability this way. Since 1951—since 1950 we have not added a new brand except a nickel brand, which is inconsequential with us. We haven't added a new brand in our distribution scheme of our cigar business to the best of my knowledge—to the best of my knowledge.

Q. By the way of digression, Mr. Glaser, is there a nickel cigar that is worth smoking?

A. Yes, there is a very good cigar. I will recommend it to you. Forty-fours. Can I get the plug in?

Q. I am not concerned, Mr. Glaser, about whether Glaser Brothers has changed its brand of cigars. What I am concerned about, to pin point it, with respect to the first item on Plaintiff's Exhibit—— [119]

The Court: I gather what you want to know is whether there was a change of brand in so far as these particular brands are concerned.

The Witness: To the best of my knowledge, no.

Q. (By Mr. Gregg): You do not know really whether the brands were changed.

(Testimony of Marcus Glaser.)

A. I would say I would be surprised if they were.

Q. Were the brands your own brands or were they the brands of other wholesalers or a mixture of brands?

A. I don't know what you——

Q. Take the three units in San Francisco.

A. Just a minute, please. I am not trying to argue here, be argumentative with this. We have 150 salesmen, or 180, to be exact. We have 35,000 accounts. Now, if you want me to sit up here and pin point three accounts in San Francisco, I am going to tell you I can't do it. But I am going to tell you the cases have held approximately the same displays before and after. I think that our records are accurate, because we try to keep them accurately. We don't try to hide nor do we try to cheat with them. I would assume what we had before is the same as we have afterwards.

Q. But that is simply an assumption; you do not know it to be a fact?

A. I cannot swear to it under oath.

Q. You have been personally connected with the cigar business [120] in San Francisco for a good many years, is that right, Mr. Glaser?

A. Yes, sir.

Q. Do you know of the Royal Showcase Company in San Francisco? A. Yes, sir.

Q. Do you know of the Regal Manufacturing Company in San Francisco? May I mention the

(Testimony of Marcus Glaser.)

name of Henry Cohen, who I understand is the owner of Regal Manufacturing Company.

A. I might. I don't recall just this minute.

Q. During your long connection with the cigar business in San Francisco has it ever come to your attention that Royal Showcase has manufactured a self-service type of cigar showcase?

A. Yes, sir.

Q. When did it come to your attention first?

A. Well, we put out the Royal Showcase—the Royal Showcase has made many kinds of self-service cases, and you are using a very bad misnomer, if you will pardon the correction, Counsel. I don't mean to be facetious on this. The word "self-service" on that case is a name somebody conjured. This is to my way of thinking. There have been many kinds of display cases built, but not until Patriarca built that case, with that particular identification of the display en masse, not until he was able to break down every theory that this business has ever had according to how a case should be built and displayed, not until then had I ever seen a case that looked like that, [121] although I will say the Royal Showcase duplicated that case sometime later, and I have had the privilege of *bringing* their owner. At that time he was semi-retired, Mr. Hoffman. I told Mr. Hoffman, "What is the idea of trying to break into a man's patent?" and he told me he would stop making that particular imitation.

Q. Mr. Glaser, you seemed satisfied with my

(Testimony of Marcus Glaser.)

term "self-service showcase." You give it any name you wish. I have heard the phrase "old-fashioned" showcase used by Mr. Patriarca himself.

A. All right. Call it old-fashioned.

Q. What was the old-fashioned showcase? What made it unsatisfactory?

A. It did not perform all the services that a good case should perform under those merchandising.

Q. What are those?

A. It should have mass display in a very, very small space, the smallest space possible. You should have mass display. You should have complete identification of the boxes so that when a man walks up to them he can see them. It should have the ability to keep the cigars fresh. It should have the ability to store cigars and keep them fresh, the six or five, whatever I have reached there (demonstrating). The top of it should be such that the dealer can't crowd it with a lot of gums, toys, flags and boxes so that the man can't see the cigars below. [122]

Q. In other words, when you supply an account with a cigar showcase, you are interested in selling cigars and not chewing gum.

A. I am interested in our selling chewing gum and candy as much as I am interested in cigars, but there is a place for everything, and what we try to do, and what we have spent most of our money in doing—not most of it but a great deal of it—but the one reason we have grown is we

(Testimony of Marcus Glaser.)

have taken an interest in how the dealer merchandises, and we have spent our money on displays and cases to help him merchandise.

Q. Then I take it, Mr. Glaser, it is the policy and the philosophy of your business that you do not sell to some account a showcase; you teach him how to merchandise cigars?

A. To the best of our ability.

Q. To the best of your ability, and you have been very successful at that?

A. Well, some people think so.

Q. In connection with the five, six, or how many services which a cigar showcase should perform, I am not sure I can remember them all, Mr. Glaser, but I do recall one of them you said was accommodating a great deal of merchandise in a small area, is that correct?

A. Yes.

Q. How is that accomplished in connection with the showcase [123] which is Plaintiff's Exhibit 5, which is the showcase here (indicating)?

A. May I come down?

(The witness approached the showcase referred to.)

Can you see that all right, Judge?

The Court: Yes, I can see it.

The Witness: When a man walks up to this case, you are now looking at 40 boxes of cigars in one shot. This gives him an adequacy of looking at what he wants to buy, and gives him his choice of sizes and shapes. It also gives him the feeling that this is not a junky piece of furniture lying

(Testimony of Marcus Glaser.)

there. A man can walk straight across this counter, pull open that door, and he has a fresh cigar.

Q. Is that the step you accomplish?

A. No, it is the over-all design, the picture of that case, the look of that case. It is something that has never been produced in this business before. I have never seen it in the cigar business.

Q. Mr. Glaser——

A. Pardon me if I get excited, but cigars are my business.

Q. Mr. Glaser, I am very sorry.

A. I didn't mean——

Q. That is all right. I do that myself. I do not know much about cigar merchandising, but I would like to focus attention——

A. There is nothing specific about the case except the over-all structure of it, the over-all feel of it, the over-all tone of it. Everything about it is good, and this is the first time this was conceived.

Q. Let us talk about humidification, Mr. Glaser. You mentioned——possibly you mentioned this on your direct examination——that one step was to keep the cigars fresh and humidified. A. Yes.

Q. I will agree with you that there is nothing worse than a dry, stale cigar.

A. May I offer you a fresh one?

Q. Thank you. It won't persuade me, but thank you. What is there about the Patriarca self-serving showcase which makes the humidification efficient?

A. The humidifier in the back throws off the moisture, and I am not a humidification expert.

(Testimony of Marcus Glaser.)

This I know nothing about except for the fact that in the buildings we have built we have spent in San Francisco about \$15,000 or \$20,000 to build a cigar display room. In Los Angeles—a cigar humidifier room. In Los Angeles we spent about \$18,000 or \$19,000 to build one. I called in the best people I knew and told them to build me what was necessary according to specification for a humidor along these lines we built it. All I know is in the desert we put this case on a test trial in Brawley. I stood it in the middle of the street. It lay there. The cigars [125] bleached, yes, but they stayed fresh. We tried everything we could. I put it in Southern California where we had to do everything in the world at some of those hot spots to keep the cigars fresh, and we have managed to do it, because fresh cigars is the thing that is going to bring the cigars back to life, and this case is the only case I have ever seen that will give us a fresh cigar.

Q. What precisely is there about that case that makes the cigars so fresh?

A. What is there about a beautiful woman that gives her class? I don't know. The whole design of the case—I can't tell you—I am not a humidification expert, Mr. Gregg. I do not know anything else except selling cigars and how to do it and what we have to do. When we put a case like this in, we aren't always sure in a man's store it is right. So we have a man stand there for two or three days at times, if we aren't sure, and we pay

(Testimony of Marcus Glaser.)

him to stand there to do this job because we want everything to be as it should be. We know the over-all contour of this case, the look of it. Look yourself. Look, that is what a cigar case used to be. This is what a cigar case is. Look yourself, look at the over-all picture of this case. This is a creation.

Q. Mr. Glaser, you mentioned one of the functions to be served by a cigar showcase was to insure that each and every box of cigars in that case was equally displayed? [126] A. Yes, sir.

Q. How was that achieved in connection with the showcase?

A. Look. Nothing is 100 per cent. Nothing is ever 100 per cent right. There always must be, even in Glaser Brothers, a margin for error. There is a margin for error even in living. So the men on both ends don't quite get the full shock that you get in the middle, but we try to give everybody who is in that case, whether our boxes or anybody else's, a full mass display, a compact display in depth.

Q. How is that accomplished?

A. By the case.

Q. Anything in particular?

A. Yes. By the looks of the case, by the steps, by the cut of it, by the jib of it, by the doors, by its construction, by the way it is handled, by the way it looks in a man's store, and by the fact that it is a beautiful piece of furniture, and we haven't

(Testimony of Marcus Glaser.)

seen anybody refuse to put it where we told them to do so.

Q. You may take the stand.

A. If I talk a little loud, it is my usual voice. Will you accept it as an apology?

Q. With regard to the cigar showcase which is here on the side of the courtroom, marked Defendant's Exhibit A, is it your opinion that none of the functions you have mentioned are served by that showcase? [127]

A. I would say it would hold cigars.

Q. You would say it would hold cigars?

A. I would say it couldn't—it couldn't produce humidification because the shelves are solid. If the shelves are solid and you put the humidifier behind the cigars—I wanted to see if the shelves were solid——

Q. That is correct. If they had holes in it, it would permit humidification?

A. It would permit some humidification, yes.

Q. Would it display the cigar boxes as effectively as the self-service showcase, Plaintiff's Exhibit 5?

A. Definitely not.

Q. Why not?

A. It hasn't the mass impact. You are looking at a case there. I don't know. I haven't seen it before, but it looks to me like that would hold about 18 cases. It will hold about 7 rows of 3, maybe 21 boxes, if it will hold that many. How many feet is it?

Q. I haven't measured it.

(Testimony of Marcus Glaser.)

Mr. Mellin: About 6 and a half feet.

Mr. Gregg: Plaintiff's Exhibit 5 is a bigger case, isn't it?

The Witness: Just a minute.

Mr. Gregg: I have a tape measure here if you want to measure it. [128]

The Witness: Six and a half. What is the width of that case?

Mr. Patriarca: The same width. Both cases are the same length.

The Witness: Both cases are the same length and the same width.

Q. (By Mr. Gregg): How about the height of the two cases? Plaintiff's Exhibit is considerably higher, is it not?

A. The height gives it some of that look. The height is what gives this thing—I told you, I think, Mr. Gregg, and this conforms to what I have said to you—that this case is not the length, it isn't the height, it isn't the width; it is the total construction, and the man who conceived it conceived something outside the ken of this business.

Q. Could we put it this way, that whatever the Patriarca self-service showcase has, it is an undefinable something or other that does the job?

A. No, it does not. You can see it.

Q. If it is not indefinable then you can define it.

A. The only reason I don't define it is I am

(Testimony of Marcus Glaser.)

not an expert. I do not intend to make some statement you are going to ask me and say, "you said this, or you said that," and I don't intend to run into it. If I am not an expert, I am not going to try to answer on an expert's subject. I have tried to answer to the best of my ability. [129]

Q. Do you know Melvin Sosnick?

A. Yes.

Q. Personally acquainted with him?

A. Yes.

Q. He is a vice-president of the NATD, is he not?

A. Yes.

Q. That is the National Association of Tobacco Distributors?

A. Yes, sir.

Q. A nation-wide organization?

A. Yes, sir.

Q. Is it somewhat of an honor and a matter of prestige to be vice-president of that association?

A. You could call it that.

Q. It is a fact also——

A. I may add I had the privilege of resigning from that honor.

Q. It is a fact, is it not, that Mr. Melvin Sosnick received the Alex Schwartz award last year?

A. I don't know.

Q. You do not know? A. No.

Mr. Gregg: That is all, your Honor.

The Court: Any further questions?

Mr. Mellin: No further questions.

ROBERT J. DELANEY

was called as a witness on behalf of the plaintiff, and being [130] first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Mellin): Mr. Delaney, will you give your name, age and residence address?

A. Robert J. Delaney, 3718 Taraval, 38.

Q. That is Taraval, San Francisco?

A. Yes.

Q. What is your occupation?

A. Manager of Glaser Brothers, San Francisco branch.

Q. How long have you been there approximately? A. Nine years.

Q. You helped bring this cabinet I had my hands on, Exhibit 10, into the courtroom this morning? A. Yes, sir.

Q. Where did you first see that cabinet?

A. At the Royal Liquor, 1400 Polk Street.

Q. What was the occasion?

A. I just went in and saw it. I talked to the man about his case.

Q. Did he tell you where he had obtained it?

A. Yes.

Q. Where?

A. He bought it from the Melvin Sosnick Company.

Q. How did you obtain it from him?

A. I traded one of my cases for that one, one of the [131] Patriarca cases for the Sosnick case.

Q. Exhibit 10? A. Exhibit 10, yes.

(Testimony of Robert J. Delaney.)

Q. Did anything else occur with respect to Sosnick and the case, between the man in the Royal liquor store—by the way what was his name?

A. Tindell.

Q. Do you have a note of it?

A. Yes, John H. Tindell.

Q. Was there something further you had to do with the Sosnick people before you could take the case?

A. Yes, he said he owed some money on the case. The amount I don't know.

Q. And he had to pay it off?

A. He did pay it off.

Q. And then you traded him the cases?

A. I did.

Q. And that is the exact case there?

A. Yes.

Mr. Mellin: That is all.

Cross-Examination

Q. (By Mr. Gregg): Mr. Delaney, you testified with regard to Plaintiff's Exhibit 10 that you obtained it from Royal Liquors? A. Yes.

Q. The gentleman's name was what? [132]

A. Tindell.

Q. You said that he told you that he obtained it from Melvin Sosnick Company?

A. Yes, sir.

Q. But you do not know of your own knowledge whether he did obtain it. You are simply taking his word for it, is that correct?

(Testimony of Robert J. Delaney.)

A. I am taking his word for it.

Mr. Gregg: That is all.

Redirect Examination

Q. (By Mr. Mellin): Was there more than one case of this character in his store?

A. No, sir, there was only one.

Mr. Mellin: That is all.

MARVIN SOSNICK

was called as a witness by the plaintiff under the provisions of Rule 43B of the Federal Rule of Civil Procedure, being first duly sworn, testified as follows:

The Court: You are calling him under the provisions of Rule 43B?

Mr. Mellin: Yes, your Honor.

Direct Examination

Q. (By Mr. Mellin): Will you give your name and your age and occupation, Mr. Sosnick?

A. Marvin Sosnick, 34, 49 Heather Avenue, San Francisco, [133] partner in the Melvin Sosnick Company.

Q. You active in the business of the defendant?

A. That is correct.

Q. You told me this morning that the defendant had sold a case such as Exhibit 10 to the Royal Liquor Store in San Francisco?

A. That is right.

(Testimony of Marvin Sosnick.)

Q. And that is the fact, isn't it?

A. That is right.

Mr. Mellin: That is all.

The Court: Any examination?

Mr. Gregg: No.

The Court: That is all.

Mr. Mellin: The plaintiff rests, your Honor. [134]

* * * * *

Mr. Gregg: Yes, your Honor. Before calling our first witness, I would like to offer in evidence two exhibits which have been marked for identification: Defense Exhibit B, which is a letter written by Mellin, Hanscom and Hursh, to the firm of Eckhoff and Slick; as Defendants' Exhibit C, which is a letter from Mr. Hursh to Rubinfeld Showcase Company.

The Court: These have not previously been marked for identification?

Mr. Gregg: They have been marked for identification, I believe, but not offered in evidence.

The Court: Oh, yes. They will be admitted into evidence, then, in accordance with the numbers with which they have been marked for identification.

(Whereupon Defendants' Exhibits B and C for identification were received in evidence.)

[See Book of Exhibits.]

The Court: What about Exhibit A?

Mr. Gregg: Exhibit A, your Honor, I am not ready at the present time to offer in evidence; but we will later. That is the physical exhibit, the showcase over here on the side.

Now, I would like to call as our first witness Mr. Claude L. Davincenzi.

CLAUDE L. DAVINCENZI

called as witness on behalf of the defendant, sworn.

The Clerk: State your full name for the Court and record.

A. Claude L. Davincenzi (D-a-v-i-n-c-e-n-z-i).

Direct Examination

Q. (By Mr. Gregg): Where do you reside, Mr. Davincenzi?

A. No. 2 Fair Oaks, San Francisco.

Q. What is your business?

A. I am a pharmacist.

Q. What is the name of the pharmacy with which you are connected?

A. Well, I operate the Central Drug Company, the parent company, which operates three drug-stores in the outer Mission in San Francisco.

Q. What are the three drugstores?

A. The Rex Drug Company at 4800 Mission, the Central Drug Company store at 4494 Mission, and the Golden State Pharmacy at 2450 San Bruno Avenue.

Q. Is the Central Drug Company a corporation?

A. It is.

Q. Are you an officer of that corporation?

A. I am.

Q. What is your business?

A. I am treasurer and buyer. [137]

(Testimony of Claude L. Davincenzi.)

Q. How long have you held the position of treasurer and buyer?

A. Well, for about two years. Previously I was president.

Q. You were president. How long have you been in charge of buying?

A. I have been in charge of buying since its existence, in 1919.

Q. In your buying, do you buy merchandise for the store?

A. Merchandise and everything that is purchased.

Q. You buy fixtures? A. I do.

Q. That are employed in the store?

A. That's right.

Q. Now at which of the drugstores is your office located?

A. At 4800 Mission, the Rex Drug Company.

Q. Speaking now of the Golden State Pharmacy at, I believe you testified it was, 2450 San Bruno,—is that correct? A. That's right.

Q. —in San Francisco, when did the Golden State Pharmacy first occupy the premises at which it is now located?

A. Well, I think it was in the neighborhood of 1940.

Q. Are you quite certain that it would have been prior to World War II or at least in the early stages of World War II?

A. It was before World War II.

Q. It was before World War II?

(Testimony of Claude L. Davincenzi.)

A. Maybe a year or so before, or maybe two years. [138]

Q. But you are certain it was before?

A. Absolutely.

Q. When the Golden State Drug Company moved into its quarters at 2450 San Bruno Avenue, was the building that you moved into a new building or an old building?

A. New building.

Q. It was a new building. It was the building put up specifically for your drugstore or for a drugstore?

A. Well, yes, it was. In fact, we had talked the owner into building the building for medical offices and a drugstore.

Q. And has the Golden State Pharmacy been at that location ever since you first occupied it?

A. Yes, it has.

Q. When the Golden State Pharmacy moved into its premises at 2450 San Bruno Avenue in San Francisco, were old fixtures moved into the store, or——

A. No, entirely new fixtures.

Q. Entirely new fixtures. Now have those same fixtures been there ever since?

A. Well, with a few modifications, yes.

Q. Did the fixtures that were moved into the store at that time include cigar showcases?

A. Yes, they did, and the same ones are still there.

(Testimony of Claude L. Davincenzi.)

Q. Same ones are still there. How many were there? A. Two. [139]

Q. Two. Did you as buyer at that time purchase the fixtures, including the cigar showcases?

A. That's right, it was all one contract.

Q. From whom did you buy them?

A. Regal Manufacturing.

Q. What is Regal Manufacturing, what sort of a business is it?

A. Well, they are general manufacturers of store fixtures.

Q. I see. And who, any particular individual at Regal that you know?

A. That's right, Mr. Cohen.

Q. Mr. Cohen? A. Henry Cohen.

Q. What is his position with Regal?

A. Well, at the time he was the owner of it.

Q. He was the owner of it. Do you know whether he is still the owner of Regal?

A. Well——

Q. Or connected with Regal?

A. Well I think he is kind of semi-retired. I think his son has taken over.

Q. Now in connection with these cigar showcases, Mr. Davincenzi, which you testified were installed as new fixtures at the *Golden Gate* Pharmacy prior to World War II, I am going to enumerate certain features, and I wish to ask you if those [140] showcases, those cigar showcases, have these features: First, were they what could be described as self-service cigar showcases?

(Testimony of Claude L. Davincenzi.)

A. Yes, sir.

Q. Now did these showcases, or do these showcases have steps to support cigar boxes?

A. They do.

Q. Do you have sliding glass panels covering the display area? A. They do.

Q. Do those sliding glass panels slope?

A. They do.

Q. Is there rear storage beneath the steps?

A. That's right, they do.

Q. Are there sliding doors closing that rear storage compartment? A. There is.

Q. Do the cigar showcases of the type you have described—are they in place in the Golden Gate Pharmacy at the present time?

A. That's right.

Q. And those very same cases without any modification were there prior to World War II, is that correct? A. They were.

Q. And have been there continuously ever since?

A. Absolutely. [141]

Q. I wish to hand you some photographs, Mr. Davincenzi, and ask you to identify them. First,—

(Conversation among counsel out of hearing of the reporter.)

Mr. Gregg: I have a group of four photographs which I would like to have marked in evidence as Defendants' Exhibit next in order.

The Court: You want the photographs as a

(Testimony of Claude L. Davincenzi.)

group in one exhibit, or do you want them separately identified?

Mr. Gregg: I think possibly it might be better if we have them separately identified, each photograph. There are four of them.

The Court: All right, then, it will be D—is that the next number in order?

The Clerk: Yes, your Honor.

The Court: All right, start with Defendants' D, then E, F and G.

(Whereupon photographs referred to above were received in evidence and marked Defendants' Exhibits D, E, F, and G.)

[See Book of Exhibits.]

Q. (By Mr. Gregg): I hand you, Mr. Davincenzi, certain photographs which are marked for identification Defendants' Exhibits D, E, F, and G, and ask you if you can identify them?

A. Yes, they are my showcases. I identify them.

The Court: What was that? [142]

The Witness: Identify them; they are my showcases.

The Court: All right, thank you.

Q. (By Mr. Gregg): Are the photographs of the showcases located at the Golden State Pharmacy in San Francisco, as to which you just testified?

A. They are.

Q. Did you see photographs being taken of the cases? A. Yes, I did.

Q. And was a set of photographs delivered to you? A. They were.

(Testimony of Claude L. Davincenzi.)

Q. Was the set delivered to you delivered by the man you saw taking the pictures?

A. They were.

Q. And the set that was delivered to you, I believe you told me you had misplaced it?

A. Yes.

Q. But can you say from recollection and memory that they appear to be identical with the photographs you have in front of you?

A. Absolutely.

Q. That is, Defendants' Exhibits D, E, F and G. Now I would like to ask you to examine these photographs very briefly and tell me whether any of them show any of the following features. Do they show steps, does any one of them show steps for supporting cigar boxes? [143]

A. They do.

The Court: Do the photographs need interpretation in that respect?

Mr. Gregg: Well, I am perfectly willing to pass on, your Honor, at that point.

The Court: In other words, you don't have to have this *witness to* the obvious. If those are photographs of his cigar cases or cigar showcases and they show the information, they don't need explanation. You don't have to explain them.

Mr. Gregg: I think that is very well taken, your Honor. They speak for themselves.

The Court: Yes.

Q. (By Mr. Gregg): Now, showcases of the type installed at the Golden State——

(Testimony of Claude L. Davincenzi.)

The Court: You desire to offer those in evidence?

Mr. Gregg: Yes, I would like to offer those in evidence.

The Court: Then they may be admitted in evidence in accordance with the numbers which they bear.

Now, then, would you hand them to the clerk and I will take a look at them? Let me look at them. All right, thank you.

Q. (By Mr. Gregg): Mr. Davincenzi, with respect to the two drugstores in the chain of the Central Drug Company, were cigar showcases of the type shown in the photographs, Defendants' Exhibits D, E, F and G,—were cigar showcases of [144] that type installed in either of the other two drugstores? A. They were.

Q. Were installations of that character made prior to about 1951? A. They were.

Q. Have you ever had occasion to replace any cigar showcases of this type in any of the three drugstores?

A. Well, I moved, changed my location four years ago, and I replaced the showcases in that one store, the cigar cases. I bought completely new fixtures.

Q. Did you make any replacement at an earlier date in any one of the three stores?

A. No, I did not.

Q. Did you, about 1946, install any showcases

(Testimony of Claude L. Davincenzi.)

or replace showcases at any one of the three drug-stores? A. Oh, in 1946?

Q. Yes.

A. Oh, yes, I enlarged the store and I installed that type showcase right over there (indicating).

Q. By "that" you are pointing to Defendants' Exhibit A let the record show.

Which of the stores did you install that at?

A. That was the Rex Drug.

Q. Is there anything to fix that date?

A. I think it was in 1944, if I remember right.

Q. 1944. At any rate, it was definitely long prior to 1951? A. Oh, yes.

Mr. Gregg: That is all. Your witness, Mr. Mellin.

The Court: Did he say—Is that the showcase that you installed?

The Witness: Similar type, except that I have a glass——

The Court: It is not the same showcase?

Mr. Gregg: No, I can stipulate to that. This didn't come from his store.

The Court: That's what I wanted to know. It is a similar one?

Mr. Mellin: We have no argument on that, your Honor, if it is the same.

Cross-Examination

Q. (By Mr. Mellin): Do you recognize Mr. Hursh sitting here, Mr. Davincenzi?

A. Mr. who?

(Testimony of Claude L. Davincenzi.)

Q. Hursh. A. I don't think I do.

Q. Did you ever meet him in your store at San Bruno Avenue?

A. I may have. I see so many faces, I can't remember them all.

Q. You don't recall someone coming in and asking you about the showcase, inasmuch as you were——

A. Oh, here about a week ago? Oh, yes, yes, sure I remember him. [146]

Q. Now, have you been entirely satisfied with the operation of those showcases, Mr. Davincenzi?

Mr. Gregg: Your Honor, I object to that.

Mr. Mellin: Just a moment.

The Court: Let him object.

Mr. Mellin: Yes, your Honor. I wanted to get my full question out.

The Court: Then get your question in and then you have the right to object.

Mr. Gregg: Sorry, your Honor. I thought he finished.

The Court: What is your question?

Q. (By Mr. Mellin): (Continuing) ——and didn't you express that to Mr. Hursh at that time?

Mr. Gregg: Your Honor, I object to that question as being clearly outside the scope of the direct examination and also as getting into the matter of the expertness of this witness with regard to the performance of cigar showcases. If Mr. Mellin wants to ask Mr. Davincenzi questions of

(Testimony of Claude L. Davincenzi.)

that character and treat him as his own witness, it is all right with the defendants.

The Court: What is the purpose of this, if it isn't just to make him an expert of yours?

Mr. Mellin: I am not making him an expert, I am asking him if as to him—he said he installed the showcases and used them. I am merely asking him if they were satisfactory in their use. [147]

The Court: What difference does it make if they are satisfactory?

Mr. Mellin: I think it makes a lot of difference, your Honor, if he says they are unsatisfactory. That is what he told my partner. There are these prior art devices put in to anticipate the invention.

The Court: That may be that they are going to claim they are prior art.

Mr. Mellin: Certainly, your Honor, and I want to show——

The Court: And I am sure Mr. Gregg concedes that that is the whole purpose of the testimony.

Mr. Gregg: Certainly. But assuming that to be true, what difference does it make if they are satisfactory or unsatisfactory?

Mr. Mellin: Well, if they are unsatisfactory, your Honor, and don't accomplish the result of the patented device, then they can't be prior art devices.

Mr. Gregg: Your Honor, it is Mr. Mellin's position that the cigar showcases of the Golden State Pharmacy are not satisfactory and are—if that is his purpose and if he means to show they are inferior to the Patriarca cases, he is perfectly at

(Testimony of Claude L. Davincenzi.)

liberty to show that through a witness of his own. But it is clearly without the scope of my direct examination.

The Court: Now, I am not sure about that. [148] If that is your position, I am not so sure. I realize that he has no right to make this witness into an expert.

Mr. Mellin: I am not trying to.

The Court: An expert on general questions of satisfactoryness. But as to whether or not these were satisfactory, in that they performed a function in the store satisfactorily, that's another question.

Mr. Mellin: That is all I am asking.

Mr. Gregg: Could we stipulate and agree that he is treating this witness as his own witness from now on?

Mr. Mellin: No.

The Court: No, I don't think he has to, because when you asked him if he installed these cases, you opened the subject of whether or not there is a generally satisfactory operation. I don't mean to say by that that this man becomes an expert witness on the cigar business and the kind of case that is the most satisfactory. I will narrow the cross-examination in that field. But I will overrule the objection, and I understand the proposition.

Now, do you understand the question, Mr. Davincenzi, or would you like to have it repeated?

The Witness: I would like it repeated.

Mr. Mellin: I will reframe it.

(Testimony of Claude L. Davincenzi.)

Q. (By Mr. Mellin): Have you found these cases entirely satisfactory for use in cigars in your store? [149]

A. Well, they were until recently.

Q. What do you mean, they were? What happened recently?

A. Well, I think I explained to the gentlemen that if you don't move your cigars very fast, that they dry out.

Q. In other words, that's always been the case with the cases, hasn't it?

A. Well, it wasn't during the war, when I used to sell cigars so fast.

Q. Oh?

A. Because cigars were hard to get and I was always fortunate enough to get an ample supply. I moved them very fast. Well, lately, naturally, everybody has cigars. I don't mean everybody, but you can buy them in a lot more locations than you could during the war, and I don't move them so fast. And when I don't move them so fast, sometimes I do get complaints that they are kind of dry.

Mr. Mellin: That's all.

The Court: Any further questions?

Mr. Gregg: No further questions.

The Court: That's all, Mr. Davincenzi, and thank you.

(Witness excused.)

Mr. Gregg: I would like to call as our next witness Mr. Henry Cohen.

HENRY COHEN

called on behalf of the defendants and sworn. [150]

Q. (By the Clerk): State your full name for the Court and record.

A. Henry Cohen, C-o-h-e-n.

Direct Examination

Q. (By Mr. Gregg): Where is your residence, Mr. Cohen? A. 601 Scott Street.

Q. What is your age, if you don't mind telling?

A. I am past 70.

Q. What is your business or profession?

A. Manufacturing store and office fixtures.

Q. What is your connection if any with the Regal Manufacturing Company?

A. I am past president of the Regal Manufacturing Company.

Q. Who is the president now?

A. Fred Cohen.

Q. Is he your son?

A. He is my son, yes, sir.

Q. Is the Regal Manufacturing Company located in San Francisco? A. Yes, sir.

Q. And its business is the showcase business, is that correct?

A. Yes, sir, for the last 48 years.

Q. As part of this showcase business, does it manufacture and sell cigar showcases?

A. Well, we make all types of showcases and store fixtures—all types of businesses.

(Testimony of Henry Cohen.)

Q. How long have you been engaged in that business? A. About 48 years.

Q. 48 years. Now I am going to describe certain features of a cigar showcase, Mr. Cohen, and I am going to ask whether Regal Manufacturing Company has ever manufactured cigar showcases having all of these features.

Mr. Mellin: If your Honor please, I don't mean to interrupt. I thought I might save time. If he is going into the same cases that the other witness said they manufactured, we have no contest as far as the other witness' dates are concerned or that he installed those that were in those photographs. I don't know if that is where counsel is going.

The Court: I imagine he wants a little broader field than that.

Mr. Gregg: I will cut short my examination in view of Mr. Mellin's stipulation, but I did want——

The Court: You will accept the stipulation, then?

Mr. Gregg: That's right, that he does not question the dates testified to by——

Mr. Mellin: That's right.

Mr. Gregg: ——by Mr. Davincenzi.

Mr. Mellin: That's correct.

The Court: Then you go into the other material.

Mr. Gregg: All right. [152]

Q. (By Mr. Gregg): Now I would like to hand you—if I may get those photographs, Defendants'

(Testimony of Henry Cohen.)

D, E, F and G,—I will hand you these and ask you if you recognize them as cigar showcases which you manufactured and sold to the Golden State Pharmacy. A. Yes.

Q. Mr. Cohen, has Regal Manufacturing Company ever sold self-service cigar showcases of the general type shown in Defendants' Exhibits D, E, F and G which are before you, in which the steps were formed with openings? A. Yes, sir.

Q. It did? A. Yes, sir.

Q. How long ago did Regal Manufacturing Company do that?

A. Well, before the certain type of material was available, we used to use expanded metal for ventilation or notching of grooves in the back risers, for ventilation.

Q. How long ago did you follow that practice, commence following that practice or doing that sort of thing?

A. Well, I believe that I was the originator of that slant front design of display, self-service display cigar case, sometime in, I would say, around 1930.

Q. And about 1930 or thereabouts?

A. That's right.

Q. Did you follow the practice on one or more occasions of [153] putting holes or perforations in the steps? A. Yes, sir.

The Court: You said in the steps. You meant in the risers?

The Witness: In the risers, that's right.

(Testimony of Henry Cohen.)

The Court: And they were perforations or holes, for, you called it, ventilation?

The Witness: That's right. I can show you a sample of the step that we have been using here since it has been available (displaying small square of masonite with holes evenly drilled).

Mr. Gregg: I would like to have this marked for identification as Defendants' Exhibit next in order.

The Court: Well, Defendants' Exhibit H for identification.

(Whereupon masonite referred to above was marked Defendants' Exhibit H for identification.)

The Court: However, I am not concerned at the moment with the new material, although I don't mean to foreclose that. I am more interested in when you first——

The Witness: Did before that?

The Court: Yes, and when you first developed this process of ventilated risers.

The Witness: Well, we did that well, practically from the time we made those cases, because——

The Court: You mean in 1930? [154]

The Witness: Well, from then on, yes.

The Court: From 1930?

The Witness: Yes. Sometimes we put, we'd get a pan, you know, and put some water in there and put a roll of toilet paper in there and use that for moisture, for ventilation.

(Testimony of Henry Cohen.)

Q. (By Mr. Gregg): Would that simple type of humidifier be placed below the steps?

A. Yes.

Q. And would it be the purpose or function of the holes or perforations in the risers to permit the circulation of humidified air?

A. That's true.

Q. From the storage space beneath the steps to the display portion above the steps? A. Yes.

The Court: What do you mean by humidified air?

The Witness: Moist air.

The Court: You just simply mean air that has been——

The Witness: ——moistened, yes.

The Court: Moisture has been added?

The Witness: That's right. You sometimes put in two of them, one on each end of the case there.

Q. (By Mr. Gregg): I hand you Defendants' Exhibit H for identification and ask you what that is. A. This here, you mean? [155]

Q. Yes, H, the object you have in your hand.

A. That's peg board, masonite peg board.

Q. When, to the best of your recollection, did you start using peg board?

A. Well, I believe it was in either 1950 or 1951.

Q. What led you to use that for the risers?

A. Well, it wasn't available before that there, and before that there, we were using expanded metal or, as I said before, grooves in the risers.

Q. Is it a fact, Mr. Cohen, that a person in the

(Testimony of Henry Cohen.)

manufacturing business such as yourself avails himself of new materials when they become available and if they are priced right? A. That's right.

Q. And with regard to the use of peg board, let us say, would that be an instance and example that became available that was suitable for the use, and you commenced using it when it became available? A. That's true.

Mr. Gregg: Those are all the questions I have, your Honor.

The Court: You may cross-examine.

Cross-Examination

Q. (By Mr. Mellin): Mr. Cohen, were these cigar cases——

The Court: Pardon me. Just one thing. Are you going to offer this in evidence? [156]

Mr. Gregg: Yes. Pardon me, your Honor, I would like to offer the last exhibit, Exhibit H, in evidence.

The Court: Defendants' Exhibit H will be admitted in evidence.

(Whereupon Defendants' Exhibit H for identification was received in evidence.)

The Court: All right, now proceed.

Mr. Mellin: Sorry, your Honor.

Q. (By Mr. Mellin): Were these cigar cases or other cases that you used this expanded metal in, Mr. Cohen?

(Testimony of Henry Cohen.)

A. Cigar cases and sometimes in bar candy cases. We used to put them on the bottom there.

Q. The bar candy cases?

A. Bar candy cases for display, self-serve bar candy cases, because there is always a certain amount of, you know, crumbs and one thing and another there that would always settle on the bottom there, and this way they would fall right through.

Q. Why didn't you use that material in the cigar cases in the Golden State Drug Store that you have testified to? A. What's that?

Q. I will show you photographs.

A. It wasn't available at that time.

Q. Well, you said expanded metal was available.

A. Yes.

Q. Why didn't you use it in those cases if it had that function? [157]

A. Well, there were grooves in there. I believe there were some grooves in there.

Q. You show me the grooves, will you, Mr. Cohen? I can't find them.

A. I can't see them in here without my glasses.

The Court: You are now talking about the risers?

The Witness: That's right.

Mr. Mellin: Steps and risers, yes, your Honor.

(Testimony of Henry Cohen.)

A. Well, from here you can't see. You can't see where the grooves are at all.

Mr. Mellin: I will show you the steps. The steps and the risers. You show me the grooves.

A. I don't see any in this one here.

Mr. Mellin: That's all.

Mr. Gregg: I would just like to ask a question of the witness, one question on redirect.

Redirect Examination

Q. (By Mr. Gregg): Mr. Cohen, if you wish to accomplish the function of humidifying cigars in a cigar showcase of the type before us in Defendants' Exhibit A, the one over here by the side of the courtroom, and if you wanted to place your humidifier out of sight and out of way down beneath the partition, wouldn't it be a perfectly obvious thing to make holes in either the steps or the risers to permit the air to circulate? [158]

A. That's true.

Mr. Mellin: Your Honor,——

The Court: Just a moment.

Mr. Mellin: If your Honor please, that is an ultimate fact for the Court as to what is obvious and what is invention.

The Court: What is the purpose of this testimony? I think Mr. Mellin's assertion is correct. Do you think you need testimony to prove that?

Mr. Gregg: Well, Mr. Mellin will concede it is an obvious thing, will he?

(Testimony of Henry Cohen.)

Mr. Mellin: That is ridiculous. Of course I won't concede anything. But, your Honor, that is one of the ancillary questions that your Honor has to decide for yourself. You don't need a witness to——

The Court: Well, as to whether or not the use of this process was or was not invention is a question for me to decide.

Mr. Mellin: That's correct.

Mr. Gregg: Whether or not it is obvious is a question of fact.

The Court: If you think it is a question of fact, I will overrule the objection and permit the witness to answer the question.

Mr. Gregg: All right.

The Court: I take it your answer is "yes"?

The Witness: May I have the question again?

The Court: Would you read it, please, Mr. Reporter?

(Record read.)

The Court: Then that answer stands.

Mr. Gregg: That's all.

The Court: Any further questions?

Mr. Mellin: No questions, your Honor.

The Court: That's all, and thank you, Mr. Cohen. You are excused.

(Witness excused.)

Mr. Gregg: We would like to call as our next witness Mr. Harold Stelling.

HAROLD STELLING

called on behalf of the defendants, sworn.

Mr. Gregg: For your information, your Honor, I would like to say the testimony of this witness will be with regard to Defendants' Exhibit A.

The Court: Would you please be seated, sir, and give us your name?

The Witness: Harold Stelling, S-t-e-l-l-i-n-g.

Direct Examination

Q. (By Mr. Gregg): Mr. Stelling, where do you reside?

A. 52 West Clay in San Francisco.

Q. What is your age, if you don't mind stating it?

A. I didn't get the question, sir. [160]

Q. What is your age, if you don't mind stating it? A. 57.

Q. What is your business or profession?

A. I am general manager and partner in the Royal Showcase Company.

Q. Where is the Royal Showcase Company located? A. 770 McAllister Street.

Q. How long have you been associated with the Royal Showcase Company?

A. Well, since 1941.

Q. Is Royal Showcase a partnership or a corporation? A. It is a general partnership.

Q. Are you one of the partners?

A. I am.

Q. Are you the manager of the business?

(Testimony of Harold Stelling.)

A. That is true.

Q. And you have been with Royal Showcase, you say, since 1940? A. Correct.

Q. What is the business of Royal Showcase Company?

A. The general manufacture and contracting of store fixtures.

Q. Among the store fixtures that Royal Showcase manufactures, does it manufacture cigar showcases? A. That's correct.

Q. And does it manufacture cigar showcases of the type that [161] can be described as self-service?

A. It does.

Q. Having steps to support the cigar boxes?

A. That's correct.

Q. Sliding glass panels covering the display portion? A. Yes.

Q. These glass panels slope? A. Yes.

Q. And there is a rear storage beneath the steps? A. Yes.

Q. And sliding doors to close that storage space, is that correct? A. Yes.

Q. How long has Royal Showcase Company been engaged in the manufacture of cigar showcases of that description, to your knowledge?

A. To my knowledge, I would say 12 or 15 years or more.

Q. Or more. Do you recognize the showcase over at the side of the courtroom which is marked for identification as Defendants' Exhibit A?

(Testimony of Harold Stelling.)

A. I believe so. I would like to take a close look at it if you don't mind.

The Court: Step down and take a look at it.

(Whereupon witness left the witness stand, examined Exhibit A and then resumed the witness stand.) [162]

Q. (By Mr. Gregg): The question is, Mr. Stelling, do you recognize Defendants' Exhibit A?

A. Yes, that is a case which we manufactured.

Q. Do you recall whether you sold, whether Royal Showcase sold such a case to the Palm Liquor in San Francisco? A. That's the case.

Q. Do you have any document or documents with you which relates to the sale of that showcase?

A. Yes, sir, I have the original, or the carbon copy, rather, of the original bill covering the sale of the case.

Mr. Gregg: I would like to have this document marked for identification as Defendants' next in order.

Mr. Mellin: No objection.

The Court: That will be Defense Exhibit I, will it not?

The Clerk: Yes, your Honor.

(Whereupon carbon copy of invoice referred to above was marked Defense Exhibit I for identification.)

Q. (By Mr. Gregg): Do you have any other document?

A. I have a delivery receipt for the delivery of the case.

(Testimony of Harold Stelling.)

Mr. Gregg: I would like to have that document marked for identification as Defendants' Exhibit next in order.

The Court: It will be Defendants' Exhibit J for identification.

(Whereupon delivery receipt referred to above was marked Defendants' Exhibit J for identification.) [163]

Q. (By Mr. Gregg): I hand you, Mr. Stelling, Defendants' Exhibits I and J and ask you to describe them.

A. Exhibit I is the carbon copy of the original bill sent to the customer, Tom Parrino, Palm Liquors, at Pierce and Haight Streets.

Q. What is the date on that?

A. June 30, 1950.

Q. Is that the date on which the cigar showcase was sold to Palm Liquors?

A. That's correct. Probably was sold, actually sold maybe a week or two or three weeks before that time. The case had to be made.

Q. What is the other document?

Mr. Mellin: What was that date?

The Court: June 30, 1950.

Mr. Mellin: June 30, 1950.

Q. (By Mr. Gregg): What is the other document, which I believe is Defendants' Exhibit J?

A. That is the receipt for the delivery of the case to the customer, Palm Liquors.

Mr. Mellin: What's that date?

The Witness: June 15, 1950.

(Testimony of Harold Stelling.)

Q. (By Mr. Gregg): The two documents, Exhibits I and J; are they documents kept, are they documents of the type kept in the regular course of your business at Royal Showcase? [164]

A. That's correct.

Mr. Gregg: I would like to offer in evidence Defendants' Exhibits I and J.

The Court: They will be admitted into evidence in accordance with the numbers they have been marked for identification.

(Whereupon Defendants' Exhibits I and J for identification were received in evidence.)

[See Book of Exhibits.]

Mr. Gregg: I would like to hand the witness some photographs, and first have them marked for identification.

The Court: The first one will be Defendants' Exhibit K. How many photographs are there?

Mr. Gregg: Three photographs.

The Court: They will be Defendants' K, L and M.

(Whereupon three photographs referred to above were marked Defendants' Exhibits K, L and M for identification.)

Q. (By Mr. Gregg): I hand you, Mr. Stelling, Defendants' Exhibits K, L and M and ask you if you can identify them as photographs of a cigar showcase.

Mr. Mellin: May I ask you, Mr. Gregg, are these pictures of that cabinet over there, or ones just like it?

(Testimony of Harold Stelling.)

Mr. Gregg: These are pictures of that very cabinet, Mr. Mellin. Would you so stipulate?

Mr. Mellin: Sure.

Mr. Gregg: Fine. Well then, that's all that I have of this witness. [165]

The Court: What about Exhibit A?

Mr. Gregg: Oh, yes; I would like to offer Exhibit A in evidence, your Honor. I am sorry.

The Court: It will be admitted into evidence as Defense Exhibit A.

(Whereupon Defendants' Exhibit A for identification was received in evidence.)

The Court: You may cross-examine.

Mr. Mellin: Thank you, your Honor.

Cross-Examination

Q. (By Mr. Mellin): Mr. Stelling, do you recall about three years ago——

The Court: Just a moment, pardon me.

Mr. Gregg: It has just been called to my attention I also forgot to offer in evidence Defendants' Exhibits K, L and M. I would like to do that.

The Court: Yes, they should be admitted into evidence in accordance with the stipulation, and they will be. They will be admitted into evidence under the letters they have been marked for identification.

(Whereupon Defendants' Exhibits K, L and M for identification were received in evidence.)

[See Book of Exhibits.]

Q. (By Mr. Mellin): You recall about three

(Testimony of Harold Stelling.)

years ago, Mr. Stelling, your concern made a cabinet that was substantially a duplicate of the ones that you see here in front of you? [166] I don't mean in detailed construction, but of that——

A. It was of that nature, yes, sir.

Q. Those dimensions and that design?

A. Yes.

Q. And you will recall the situation under which you made it was that one of the Sosnicks took one of your men or you out to a store and asked you to duplicate that cabinet. Do you recall that, do you not?

A. I didn't personally handle it.

Q. But someone did?

A. I know of the transaction.

Q. And that's what occurred?

A. And a case similar in design, I presume, was made at that time.

Q. Do you remember which Sosnick it was?

A. Well, I wouldn't know. May have been Marvin, one of the boys.

Q. And at that time the product that you came up with for them was a substantial duplicate, and right after that time, isn't it a fact that your attention was called to these Patriarca patents?

A. Yes, that's correct.

Q. And that you advised the Patriarca people that you didn't know of the existence of the patent and you would cease making the cabinet of that type? [167]

A. No, I don't think I agreed to cease making a cabinet of that type. I may have told them that

(Testimony of Harold Stelling.)

we were in the business of making custom store fixtures and made cases of that type, usually only upon the request of a customer, and that I did not, I would not as a matter of policy, infringe upon the patent rights of a competitor.

Q. And you subsequently didn't make any more cabinets just like these here, that you duplicated for Mr. Sosnick?

A. That I don't know. I can't say.

Q. You can't recall? A. No.

Q. How many of these cabinets just like Exhibit A have you made?

A. That would be hard to say, but we have made cabinets for that, of that nature, for many years, for display, with a glass front.

Q. I am talking about this particular design, for cigars, just the way it is.

A. That is an old design, sir. It is used in back-case construction as well as front-case construction where the sliding glass is in the front, just as it is on that, and more or less self-service.

Q. For almost all materials?

A. All kinds of merchandise.

Q. Hardware? [168]

A. I don't do business with hardware people, but drugstores and merchandising stores.

Q. In other words, it is a cabinet of general purpose? A. That's right.

Mr. Mellin: That's all.

(Testimony of Harold Stelling.)

Redirect Examination

Q. (By Mr. Gregg): Mr. Stelling, with regard to the alleged transaction with the Sosnicks some-time ago, it is your testimony, is it not, that——

Mr. Mellin: Just a moment. I don't think you ought to lead the witness as to what his testimony is.

Mr. Gregg: All right.

Q. (By Mr. Gregg): Were you a witness to the transaction yourself?

A. I knew of the transaction in that we were making a case for Sosnick of that nature.

Q. Now, by "of that nature," what do you mean?

A. Well, display front like this one, steps to hold cigars.

Q. Did you know whether it was showcase manufactured by Patriarca?

A. Not at that time, no.

Q. You did not. You learned of that later?

A. That's right.

Q. As a matter of fact, you don't know, do you, whether the cigar cabinet which you were asked to copy was a Patriarca cabinet? A. No.

Mr. Gregg: That's all.

Mr. Mellin: No further questions.

The Court: That's all, sir. This witness can be excused?

Mr. Gregg: Yes, your Honor.

The Court: You will be excused, then, Mr. Stelling.

(Witness excused.)

Mr. Gregg: Call as our next witness Mr. Melvin Sosnick.

Mr. Gregg: I would like to ask the Court and Clerk, since I am rather forgetful about offering exhibits in evidence, if all up to the present defendants' exhibits have been offered and received in evidence.

The Court: They have.

MELVIN SOSNICK

called as a witness on behalf of the defendants, sworn.

Q. (By the Clerk): State your full name for the Court and record.

A. Melvin Sosnick.

Direct Examination

Q. (By Mr. Gregg): What is your age, Mr. Sosnick? A. 60.

Q. Where do you reside?

A. At 30 Encanta.

Q. What is your business or profession? [170]

A. I am a wholesale distributor, partner in the Melvin Sosnick Company.

Q. What is the nature of the wholesale business?

A. Well, we distribute and job cigars, cigarettes, tobaccos, candies, sundries and so forth.

(Testimony of Melvin Sosnick.)

Q. The wholesale business goes under the name of Melvin Sosnick Company, is that correct?

A. That's right

Q. Is this a partnership? A. It is.

Q. Are you one of the partners? A. I am.

Q. Who are the other partners?

A. My three sons.

Q. When was the Melvin Sosnick Company founded? A. In 1932.

Q. Were you the founder? A. I was.

Q. Has the Melvin Sosnick Company ever been sued before, Mr. Sosnick?

A. This is the first time I have ever appeared in a courtroom, not only that I wasn't sued. [171]

* * * * *

Q. Mr. Sosnick, does the Melvin Sosnick Company manufacture showcases? [173]

A. No, they don't.

Q. Who manufactures the cigar showcases which the Melvin Sosnick Company sells?

A. Rubinfeld Showcase Company.

Q. Do you know whether or not the Rubinfeld Showcase Company manufactures showcases for other people than Melvin Sosnick Company?

A. This was, we started buying the showcases from Rubinfeld Showcase Company when we sell a showcase or two showcases in a retail store, where they purchase it right from Rubinfeld, and to date Rubinfeld sells other people here in San Francisco and elsewhere.

Q. Does the Melvin Sosnick Company, or has

(Testimony of Melvin Sosnick.)

the Melvin Sosnick Company ever had anything to do with the design of the showcases which it has purchased from Rubinfeld Showcase Company?

A. Nothing whatsoever.

Q. Are you exclusive distributors in San Francisco or in any other area for Rubinfeld Showcase Company? A. No, sir.

Q. And as far as you know, anyone in San Francisco or any place else can obtain showcases from Rubinfeld Showcase Company on the same terms that you do? A. That's right.

Q. Mr. Sosnick, have you at any time asked Mr. Stelling or [174] anyone connected with the Royal Showcase Company or anybody else to copy a Patriarca showcase? A. No, sir.

Q. Do you know whether anyone in the Melvin Sosnick Company has made such a request?

A. As far as I know, no.

Q. Have you asked the Rubinfeld Showcase Company to give assistance in this lawsuit?

A. I did.

Q. Did they refuse to give you assistance?

A. Mr. Rubinfeld told me that he has been in business seven or eight years, that he was in a concentration camp for six years, and that was—he was financially unable to assist me in the expense of this case here.

Q. Then is the financial burden of defending this lawsuit, is that being borne entirely by the Melvin Sosnick Company? A. Entirely.

* * * * *

(Testimony of Melvin Sosnick.)

Q. (By Mr. Gregg): Do you regard it as unjust and unfair that the Melvin Sosnick Company should be sued for infringement, alleged infringement of the Patriarca and Cameron patents? [175]

* * * * *

A. I believe that I am persecuted, singled out, because we only sell probably one-tenth of one per cent of the cases sold by Rubinfeld. I think, and can't understand why two men would travel three thousand miles to come to San Francisco to sue one individual distributor who is in only one city and vicinity, when he can do it right in his backyard. Now, why it is done that way, I don't know.

Mr. Gregg: That's all.

Mr. Mellin: No questions, your Honor.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Gregg: I would like to call as our next witness Mr. Marvin Sosnick.

MARVIN SOSNICK

called on behalf of the defendants, being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Gregg): State your name, Mr. Sosnick.

A. My name is Marvin Sosnick, S-o-s-n-i-c-k.

Q. Are you one of the defendants in this suit?

A. I am.

(Testimony of Marvin Sosnick.)

Q. Are you the son of Melvin Sosnick, the witness who just finished testifying? [176]

A. That's right.

Q. Are you one of the partners in Melvin Sosnick Company? A. I am.

Q. What is your particular connection with the Melvin Sosnick Company?

A. More or less in charge of sales and promotions.

Q. How long have you held that position?

A. Oh, about ten years.

Q. What were you doing prior to that?

A. Well, just learning that business.

Q. The business of Melvin Sosnick Company is that of a wholesaler of cigars, candy and cigarettes, is it not? A. That's correct.

Q. In what territory does the Melvin Sosnick Company operate?

A. In the San Francisco area, down the Peninsula, Santa Rosa.

Q. It is not a state-wide business, is that true?

A. It is not.

Q. Is it considerably smaller than, let us say, Glaser Brothers as a cigar wholesaler?

A. That's right.

Q. Is the cigar business an important part of the business of Melvin Sosnick Company?

A. It is.

Q. Could you tell us, beginning at the beginning as far as [177] you know it, how the Melvin Sos-

(Testimony of Marvin Sosnick.)

nick Company got into the business of selling cigar showcases?

A. Well, we had requests from our retailers for such type case or a self-service case, I should say. I was visiting with one of our retailers and he told me that he had purchased two of these cases from Rubinfeld. Presently the cases were delivered while I was still in the store. I liked the case and offered it to our retailers.

Q. Did you at any time request Mr. Stelling or anyone else connected with the Royal Showcase Company or anybody to copy a Patriarca case?

A. No, sir.

Q. Do you know whether anybody else connected with Melvin Sosnick Company made any such request?

A. I would be the only one who would make such a request.

Q. And you did not? A. I did not.

Q. At any time did you ask the Rubinfeld Showcase Company to design a particular case for you?

A. Never.

Q. There was a change that was made in the case which you are selling, and that is best shown in Defendants', or rather, Plaintiff's Exhibit 3, where a witness yesterday drew in in pencil a modification change in the cabinet. Did you request Rubinfeld Showcase Company to make that change? [178]

A. No, I didn't. In fact, I was rather surprised when I saw a shipment come in that way.

Q. At the time the Melvin Sosnick Company

(Testimony of Marvin Sosnick.)

commenced to engage in the sale of self-service cigar showcases, did you know anything about the patents to Mr. Cameron and Mr. Patriarca, which are in suit in this case? A. No, I didn't.

Q. Do you know whether anybody else connected with Melvin Sosnick Company knew of these patents at that time? A. No, they didn't.

Q. Rubinfeld Showcase does not manufacture exclusively for Melvin Sosnick Company, is that correct? A. That's right.

Q. Do you have any idea about the percentage of the output of Rubinfeld Showcase Company that you sell?

A. Well, I saw Mr. Rubinfeld last October and at that time I believe he said he put out over a thousand cases.

Q. And is your proportion small or large in comparison to that amount of showcases?

A. It is a fraction of a per cent of that.

Q. As far as you know, anyone anywhere can purchase Rubinfeld showcases from Rubinfeld Showcase Company? A. That's right.

Q. Without going through you?

A. Yes. [179]

Mr. Gregg: That's all.

The Court: Cross examination.

Cross Examination

Q. (By Mr. Mellin): Mr. Sosnick, how long have you known Mr. Stelling?

A. Oh, I guess I have known him for, well,

(Testimony of Marvin Sosnick.)

maybe ten to twelve years.

Q. He is rather a reputable citizen, isn't he?

A. He is.

Q. And you didn't believe him on the stand this morning, did you? A. I beg your pardon?

Q. In his testimony, you didn't believe his testimony this morning, did you?

A. I believed his testimony, of course you must realize, Mr. Stelling did not say that I was the one, nor that it was anyone particularly from our organization who asked him to copy a showcase. It may have been one of our customers. [180]

* * * * *

Q. (By Mr. Mellin): Now, before this suit was brought against the Sosnick Company, you had had written notices of the patents in suit, did you not?

A. That's correct.

Q. And before the suit was started, you had ample opportunity of discontinuing what you were charged with, did you not—had you not?

A. The reason we didn't discontinue putting out the cases is, we went to some of our people that we knew in the manufacturing business and they told us they had been making these cases for many, many years, same type cases. We took it up with our attorneys and they told us to keep going ahead and selling cases.

Q. I mean, you weren't sued without an opportunity of stopping the acts that were complained of?

A. Well, that I don't know. I don't know what

(Testimony of Marvin Sosnick.)

was in the back of Mr. Patriarca's mind when he set the thing up.

Q. Now, I don't think you understood my question, Mr. Sosnick. You were first given notice that you were infringing? A. That's right.

Q. And at that time, to avoid the lawsuit, you could have stopped distributing these? [181]

A. That's correct.

Q. This minute number of cases you say that you handled? A. That's right.

Q. But you didn't do that?

A. That's right.

Q. You preferred to stand suit?

A. I didn't say that.

Q. What did you say?

A. I said that we had taken the thing up with other showcase manufacturers. They had showed us where they had made similar type cases in the past many, many years. We took it up with our attorneys and on their advice we continued selling the cases.

Q. In spite of the warning?

A. That's right.

Q. So you expected to be sued?

A. Well, I don't expect anything. I can't say I expected to be sued, no.

Q. I see. Now at that time, at the time of the suit, was it a profitable business to the Sosnick Company to distribute these cases?

A. It was not.

Q. It was not. Is it now?

(Testimony of Marvin Sosnick.)

A. We make a reasonable profit, oh, probably four, five, maybe six per cent. [182]

Q. But at the time it wasn't profitable, but you still preferred to continue manufacturing?

A. Well, if you call four or five or six per cent profitable, then I would say it was profitable.

Q. You don't consider it so?

A. Beg pardon?

Q. You don't consider it so?

A. Not a very, very small margin, no—on the small amount we have sold.

Mr. Mellin: That's all, your Honor. [183]

* * * * *

DONALD LIPPINCOT

called on behalf of the defendants, sworn.

The Court: I want the record to show that I am personally acquainted with this witness. As a matter of fact, he was a classmate of mine in law school and I have known him for a long time well and honorably.

Q. (By the Clerk): State your full name.

A. Donald K. Lippincot.

Direct Examination

Q. (By Mr. Gregg): Where do you reside, Mr. Lippincot?

A. 56 Lacuesta Drive, Orinda, California.

Q. If you don't mind telling us, what is your age?

A. 67.

Q. What is your profession?

(Testimony of Donald Lippincot.)

A. I am a patent lawyer and registered professional engineer.

Q. Do you practice in your profession here in San Francisco? A. I do.

Q. Would you, commencing after you left high school, outline briefly your education?

A. I was graduated from the University of California in the College of Mechanics in 1913. I practiced as an engineer for [184] 14 years, then took up the study of patent law. I was registered as what was then known as a registered patent attorney, and would now be called patent agent. Sometime later I went to law school, as his Honor has indicated. I did not graduate—I was later admitted to the California Bar.

Q. Could you describe very briefly your career since leaving college? You testified, I think, you graduated in engineering from the University of California.

A. I spent about 25 years immediately after graduation in various phases of the manufacture of x-ray apparatus. I then took a job as a development engineer in the development and manufacture of thermo-relays for the protection of electric motors.

Q. Have you had any practical experience in industry, Mr. Lippincot? And by that I mean other than in connection with your profession as a patent attorney and patent lawyer.

A. Yes, I became chief engineer of this outfit manufacturing thermo-relays, which was responsible for a number of patents there which were later

(Testimony of Donald Lippincot.)

purchased by the General Electric Company. I spent two years then as engineering partner of a promoter of patented inventions, and then at the advent of broadcasting, I was first the sole engineer of a small manufacturer of radio equipment. I went later to the Magnavox Company and was first radio engineer, and then chief engineer for the Magnavox Company, prior to going into patent work when [185] the Magnavox Company moved East.

Q. In connection with your practical experience in industry, have you ever had occasion to handle problems concerning the design of cabinets?

A. It was minor feature of the work in x-ray and in radio work. As chief engineer, the man in charge, I had to know something about cabinets.

Q. Were you in the military service during World War II? A. I was.

Q. Would you describe your rank and your duties and office in that connection?

A. I was called to duty with the rank of major in January, 1941. I was first assigned to the research and development division of the office of the Chief Signal Officer in Washington, D. C. In that capacity and later, I was signal corp liaison officer with what was first known as NBRC and later absorbed by OSRD, office of scientific research and development. I was liaison officer with the National Inventors Council. In November of 1941, a legal division was set up in the office of the Chief Signal Officer. At that time I was transferred to the legal division as patent and inventions counsel. In that

(Testimony of Donald Lippincot.)

capacity I was in charge of all patent work of the signal corp. But as inventions counsel, I had the duty of doing the first screening of all inventions that were submitted to the signal corp. I was promoted to first a lieutenant colonel and then [186] to colonel. I got my colonelcy in July of '45, and shortly thereafter I was made director of the legal division, the office of Chief Signal Officer.

Q. In connection with the duties with the signal corp, did you have wide experience in handling and evaluating inventions?

A. I did. I had been termed "the bottleneck" for inventions coming into the signal corp. The first screening was done by the National Inventors Council in general. Following that, the inventions that were deemed worthwhile came to my desk. I and my staff evaluated them, and then in consultation with the various engineering divisions, examined the military needs and practicality, and the possibility of putting them into actual manufacture. In addition to that job, the signal corp took a large number of licenses. We negotiated some, not for the signal corp alone but for the government. We negotiated licenses under what was generally estimated as about 20,000 patents. Many of those were offered freely. In other cases the owners of the patents desired royalties or license fees, and in some cases those license fees were very large, and under those circumstances we had to evaluate the inventions covered by the patents, and it sometimes involved very careful evaluation.

(Testimony of Donald Lippincot.)

Q. Mr. Lippincot, have you visited the Palm Liquor Store which is located, I believe, at Haight and Pierce Streets in San Francisco? [187]

A. I did.

Q. And did you see a self-service cigar showcase at that location? A. I did.

Q. Do you recognize the showcase inside the courtroom which is in evidence as Defendants' Exhibit A, as the same case? A. I do.

Q. Have you also visited the Golden State Pharmacy at 2450 San Bruno Avenue in San Francisco?

A. I did.

Q. Did you observe any showcases at that location? A. I did.

Q. I would like to ask you if you will recognize—I hand you Defendants' Exhibit D, E and F and ask you if you recognize those as photographs of the showcase at Golden State Pharmacy at 2450 San Bruno Avenue?

A. They appear to be the same both as to the structure and environment.

Q. Now directing your attention, Mr. Lippincot, to Plaintiff's Exhibit 3, which is an enlargement of a drawing of the Cameron design Patent 168,288, I would like to ask you whether that resembles the showcases at the side of the courtroom, which is Defendants' Exhibit A?

A. It has many features in common.

Q. Do the two generally resemble each other?

A. I think we could say so.

Q. What if any is the principal difference in the

(Testimony of Donald Lippincot.)

appearance between the Cameron showcase as shown in Plaintiff's Exhibit 3 and the showcase at that side of the courtroom, which is Defendants' Exhibit A?

A. The showcase, Exhibit 3, has a somewhat larger display window in comparison with the wooden base, the wooden riser, and the base slants rearwardly instead of rising vertically. The lower panel, that is.

Q. By "base," do you refer to the portion which is marked E on Defendants' Exhibit 3?

A. Yes, I refer to that lower panel marked E.

Q. Now with regard to the lower panel or the sloping lower front, as it has been sometimes called, do you know whether or not that is anything new or novel in connection with display cabinets?

A. It is shown in many cabinets in the prior art with different degrees of slope, different—all sorts of varying ratios of dimension between the glass display portion and the sloping lower panel, lower front.

Mr. Gregg: I would like to have marked for identification certain patents. Mr. Mellin, this is a photostatic copy of an Italian patent.

Mr. Mellin: Yes.

Mr. Gregg: Stipulated that the translation is a true and [189] accurate translation?

Mr. Mellin: No objection.

The Court: Do you so stipulate?

Mr. Mellin: Yes, your Honor.

(Testimony of Donald Lippincot.)

Mr. Gregg: I hand the clerk Italian Patent No. 459257 and ask that it be marked for identification.

The Court: Next in order.

The Clerk: N.

The Court: Defendants' Exhibit N. And that is Italian patent——?

Mr. Gregg: Italian Patent 459257.

(Whereupon Italian Patent No. 459257, referred to above, was marked Defendants' Exhibit N for identification.)

Mr. Gregg: I also hand the clerk a copy of the Tamsen Patent, U.S. Patent No. 2575643.

The Court: Defendants' Exhibit O for identification.

(Whereupon Tamsen Patent, U.S. Patent No. 2575643, referred to above, was marked Defendants' Exhibit O for identification.)

Mr. Gregg: Also hand the clerk a copy of Jensen Patent No. 1542242 and ask that that be marked next in order.

The Court: What's that number again?

Mr. Gregg: 1452242.

The Court: That's Defense Exhibit P for identification.

(Whereupon Jensen Patent No. 1452242, referred to above, was marked Defendants' Exhibit P for identification.) [190]

Mr. Gregg: I also hand the clerk a copy of Dulgeroff U.S. Patent No. 11612466 and ask that be marked as exhibit next in order.

The Court: Defense Exhibit Q for identification.

(Testimony of Donald Lippincot.)

(Whereupon Dulgeroff U.S. Patent No. 11612466, referred to above was marked Defendants' Exhibit Q for identification.)

Mr. Gregg: I also hand the clerk a copy of U.S. Patent to Leibe, No. 977318, and ask that be marked next in order.

The Court: Defense Exhibit R for identification.

(Whereupon U.S. Patent to Leibe, No. 977318, referred to above, was marked Defendants' Exhibit R for identification.)

Q. (By Mr. Gregg): I hand to you, Mr. Lippincot, Defendants' Exhibits N, O, P and R, and I ask you if you recognize them as copies of patents granted to more than year prior to the filing date of Cameron Patent 168288, and to refresh your recollection, the filing date is May 7, 1952. Hand you a copy for your convenience of the Cameron Design Patent.

A. Thank you. Yes, I have examined these previously. I recognize all of them as those that I have looked at and compared with these.

Mr. Gregg: I would also like to add to that group of patents one further one, Rosenberg, 543657, and have it marked as Defendants' Exhibit next in order.

The Court: That is Defendants' Exhibit S.

(Whereupon the patent referred to above, Rosenberg, [191] 543657, was marked Defendants' Exhibit S for identification.)

Q. (By Mr. Gregg): I hand you Defendants' Exhibit S and ask you the same question, whether

(Testimony of Donald Lippincot.)

you recognize that as a patent granted more than one year prior to the filing date in the Cameron Design Patent? A. I do.

Q. Do any of these patents show in connection with a display cabinet the feature of a sloping lower front wall, such as shown as E in Plaintiff's Exhibit 3?

A. They do, starting with the Rosenberg Patent, which issued July 30, 1895. That feature is shown and its utility is described, at the bottom of the first column beginning at line 96—or the second column, excuse me, of the first page.

Mr. Gregg: I have some copies of the patent if you would like them for reference, your Honor.

The Court: Yes, I would.

Mr. Gregg: This is the Tamsen patent, which I believe is the first one of the group, then the Jensen patent, the Dulgeroff patent, the Leibe patent. But I don't have a spare copy of the Rosenberg patent. Just the one the witness has.

The Court: All right.

Q. (By Mr. Gregg): Will you proceed?

A. At the beginning, beginning at line 96,—

Q. Which patent is this, now?

A. This is the Rosenberg patent, Exhibit S, I believe. Yes. [192] It says: "The front of the attachment inclines from the top—" incidentally, this is the attachment to a counter for, I take it, dry goods stores and the like. And it is to add a display to such a counter. It says:

"The front of the attachment inclines from the

(Testimony of Donald Lippincot.)

top outward to the molding (B super 4) and from the molding (B super 4) to the base of the attachment (B super 5) inclines inward. The purpose of this arrangement is to allow the purchaser to stand near the counter, the space below the molding (B super 4) permitting the feet to pass inward while the apex of the angle (B super 4) prevents the glass from being broken by the person in front of the counter coming in contact with it."

In this one—(indicating to the Court).

The Court: I have a copy of it now.

The Witness: All right, sir.

Mr. Gregg: Which one is that?

A. That is the Rosenberg patent.

Q. Which is—— A. Exhibit S.

Q. S.

A. In the Italian patent,——

Q. The exhibit number there is what, Mr. Lippincot? A. N.

Q. N. [193] A. Yes, I believe so.

The Court: I don't think I have the Italian patent.

Mr. Gregg: Oh, I believe I have another copy.

Mr. Mellin: May I offer the Court mine?

Mr. Gregg: I am sorry, I just don't have an extra copy of that.

(Conversation among counsel and Court out of hearing of the reporter.)

Mr. Gregg: There is no translation attached, but the drawings are attached to the patent.

The Court: All right.

(Testimony of Donald Lippincot.)

A. (Continuing) This is described, this Italian patent, Exhibit N, is described in the translation. It is a case for keeping and delivering retail food products such as pastes, rice, flour, vegetables, citrus and other fruits, and the like. It is especially adapted to retail shops. As is quite clear from the drawings, this has an outwardly sloping upper panel and an inwardly sloping lower panel. The upper panels can be opened, not in this case by sliding, but by tilting, to get at the foods that are shown inside. The slope is different from the Rosenberg patent, but the purpose is generally the same.

Exhibit O is the Tamsen patent.

Q. T-a-m-s-e-n?

A. T-a-m-s-e-n. It is a popcorn warmer. It shows the same [194] general arrangement. Again the slopes are slightly different.

The Jensen patent is another counter that has varying slopes front and back.

Dulgeroff, Exhibit Q, exhibits the same features. In this, the front with the varying slopes forms a tilting bin. But the profile, the end view of all these, are extremely similar, with but very slight variations in the slopes.

The Leibe, the Bonnaffons patent, Exhibit R, goes back to 1910. It shows a glass front to view the material inside. It slopes rearwardly, and the lower portion slopes forwardly. And these patents date, as I mentioned, this last one is 1910, Exhibit Q, Dulgeroff is 1915, Jensen, Exhibit P is 1923. Tamsen, the popcorn warmer, Exhibit O, is 1951. The

(Testimony of Donald Lippincot.)

Italian patent was granted September 1, 1950, and published in April of 1951. The Rosenberg patent, as I already mentioned, is 1895.

Q. Were any of the patents as to which you have just testified, and which are marked for identification as Defendants' Exhibits N, O, P, Q, R and S,—were any of those patents prior patents considered by the patent office in the prosecution of the application which led to the Cameron Design Patent?

A. They were not.

Q. Were not? A. Yes, were not. [195]

Mr. Gregg: I believe we can stipulate, Mr. Mellin, that the date of invention with regard to the Cameron patent is approximately September of 1951?

Mr. Mellin: I think that will be all right. Oh, no. September? No, I think that—yes, that's approximately right, yes.

Mr. Gregg: There is a stipulation, we can correct it if it is in error.

Mr. Mellin: I think that's correct. Without my glasses I didn't see that November date there.

Q. (By Mr. Gregg): In view of the state of the *arc* as shown by the patents as to which you have testified, Defendants' Exhibits N, O, P, Q, R and S, would there be anything unobvious in providing a self-service cigar showcase having the general features shown in Defendants' Exhibit A and modifying that so as to incline the lower front wall?

A. Not in my opinion. It appears quite obvious

(Testimony of Donald Lippincot.)

to me from viewing these patents that a showcase is built very largely, a great many of them, as was testified here this morning,—they are built to order to meet a particular requirement to fill a specific space. We have shown here all sorts of different slopes. We have the rearwardly inclined front panel repeated many times. And I think that the Rosenberg patent sets forth as clearly as any of these do the reason for doing that. [196]

Q. And that reason again is what?

A. Beg pardon?

Q. The reason is what?

A. The reason is to allow the purchaser to stand near the counter, permitting the feet to pass inward while the apex of the angle prevents the glass from being broken by the person in front of the counter coming in contact with it. I have omitted the reference characters in rereading that.

Q. Would it be correct to say that the sloping lower front wall of a cigar showcase, such as shown in the Cameron Design Patent, is primarily a utilitarian feature rather than an ornamental feature?

A. I would think so, yes.

Q. You have testified that you have visited the Golden State Pharmacy at 2450 San Bruno Avenue, San Francisco, and also Palm Liquor, out at Haight and Pierce in San Francisco, and have seen the showcases there. At the time you saw them, were they filled with merchandise? A. They were.

Q. What was the merchandise?

A. Cigars.

(Testimony of Donald Lippincot.)

Q. In boxes? A. In boxes.

Q. Did the cigar boxes completely cover the steps and risers so that you could not easily detect them? [197] A. They did.

Q. Bearing in mind the fact—Is it your observation that that is the normal appearance of a cigar showcase to a customer, that is, that it is filled with cigar boxes so that you cannot see the steps and risers?

A. Well, as can be seen by a glance at the cigar case, Exhibit A, if the cigars are displayed in boxes so that the cigars themselves can be seen, the boxes will be open and the covers of the boxes will conceal the risers, while the box itself conceals the steps.

Q. Looking now at the three cigar showcases which are in the courtroom, the one on the right, Plaintiff's Exhibit 5, the Patriarca case, the one on the left, Plaintiff's Exhibit No. 10, which is sold by the Melvin Sosnick Company, and the one over next to the wall of the courtroom, which is Defendants' Exhibit A, and assuming that they are filled with boxes of cigars, is there a strong resemblance among all three? A. There is.

Q. I direct your attention to the feature of Defendants' Exhibit A, the Palm Liquor cigar cabinet, and to the black portion which I believe is called a "kickstand" by some people, at the bottom of it. In normal use, that kickstand elevates the lower edge of the case about, I would say,—would you say four or five inches off the floor? A. Yes. [198]

Q. What is the purpose of that?

(Testimony of Donald Lippincot.)

A. Same as that of the sloping, rearwardly sloping lower front.

Q. And that function is what?

A. To let the customer get his feet underneath without stubbing his toe.

Q. Now with regard to a modification of the cabinet sold by Melvin Sosnick Company as illustrated, I would rather in this connection show you a stipulation which stipulates as to the appearance of the cabinets and——

Mr. Gregg: Mr. Mellin, I would like to ask either that we consider the original stipulation on file in the case as a part of the record, or——

Mr. Mellin: That's all right.

Q. (By Mr. Gregg): I hand you my copy of a stipulation of file in the case, stipulating concerning the devices manufactured, sold and used by the defendants, and I direct your attention to the second sheet of drawings attached, as to figure two, and ask you what would be the function of the overhang?

A. The same as that of the rearwardly sloping front, to let the customer get close with his feet under the front of it so that he could more easily reach the merchandise.

Q. Would it serve also the same function as the kickstand in connection with Defendants' Exhibit A? [199] A. Yes.

Q. Would you say that an overhang on the one hand, such as shown in the stipulation, which is in front of you, the kickstand such as we have in Defendants' Exhibit A as a sloping lower front wall

(Testimony of Donald Lippincot.)

as shown at E in Plaintiff's Exhibit 3, that all of those are primarily utilitarian functions?

A. I think so.

Q. And is their utility something obvious or something unobvious?

A. It is quite obvious to me.

Q. Do you know whether or not the Cameron and Patriarca patents were simultaneously pending in patent office?

A. Yes, I have examined certified copies of the file wrappers of both patents.

Q. Do you know whether or not they were examined by the same patent examiner or by different patent examiners?

A. They would be examined by different patent examiners. There are different signatures on the office actions and they were in different divisions of the patent office.

Q. Now by different divisions, could you elaborate on that a little bit more? Where was the Cameron Design Patent examined?

A. It would have been examined in a division of the patent office that considers only Design Patents.

Q. And the Mechanical Patent, Patriarca Patent 2735739, would have been examined in some other division of the patent [200] office?

A. It would have been examined in the division that considers Mechanical or Utilitarian Patents.

Q. Now you have stated that you have examined the certified copies of the file wrappers of the two patents. Do those documents reveal whether or not

(Testimony of Donald Lippincot.)

either examiner knew of the pendency of the other patent?

A. They would indicate to me that neither one did know of the existence of the other co-pending application.

Q. Were both patent applications, the one which matured into the Cameron Design Patent and the other that matured into the Patriarca Mechanical Patent,—were they handled by the same attorney?

A. They were.

Q. Is that his name that appears in the lower right-hand corner of the two exhibits, Plaintiff's Exhibits 2 and 4?

A. The signature is the same as that on the prosecution documents.

Q. Would you say that there was anything unusual about the prosecution of the two patent applications, one maturing into the Cameron Design Patent and the other the Patriarca Mechanical Patent?

A. Yes, there is something quite unusual to me.

Q. Would you explain it?

A. We have two patents, the figures one of the two patents [201] are very nearly identical. The one is presented as a Utilitarian Patent whose purpose is purely functional.

Q. Which is that?

A. That is the Patriarca Patent.

Q. Yes?

A. The other is an ornamental design. It is presented as something which is beautiful and aesthetically pleasing without regard to what it is made of

(Testimony of Donald Lippincot.)

or what its purpose is. The Mechanical Patent, the Patriarca Patent, was the first filed; it was filed in November of '51. The Cameron Patent is filed in May, '52—roughly six months later. They are presented by different inventors, and if the Patriarca Patent had issued first, it would undoubtedly have been a complete reference against the Cameron Patent. The patent office had no knowledge of this. With a design, an identical design presented by a different party with an earlier filing date, the situation is at least unusual. The same attorney filed them, and no doubt he knew that at least there was a claim that the design was invented by one man and the—that is, that the design invented by one man was invented by him prior to the mechanical features invented by the other. But the same features are claimed as novel in both of the applications, and it would seem to me that it might have been better for the validity of both patents if the patent office had been informed as to what the situation was there, and that the two [202] cases were pending. There is no claim in a Design Patent except the formal claim, which always reads the same. It is not a case where you could present identical claims and get into an interference between the two parties. But there certainly are so many common features that it is remarkable that two patents would issue covering the same features, as in one case, features that contributed to the beauty of the case, and in another patent, another application, as features which were purely utilitarian.

(Testimony of Donald Lippincot.)

Mr. Gregg: I would like to interrupt the examination for just a moment to offer in evidence Defendants' Exhibits N through S; that is the group of patents as to which Mr. Lippincot testified.

The Court: With no objection, they will be admitted into evidence in accordance with the letters with which they have been marked for identification.

(Whereupon the Defendants' Exhibits N through S for identification were received in evidence.)

[See Book of Exhibits.]

Mr. Gregg: The Design Patent, the Cameron, was filed approximately six months after the Patriarca Patent, the respective date being May 7, 1952, in the case of the Design Patent, and November 16, 1951, in connection with the Mechanical, Patriarca Patent. Now in accordance with your experience as a patent attorney, and had you been soliciting the two cases and been in the position of calling to the [203] attention of the examiner in the case of the Cameron Patent, or Cameron Patent Application, the fact that the Patriarca Patent Application was co-pending and had been filed about six months earlier, would you have anticipated that the examiner would reject the Cameron Application? A. I would.

Q. That he would refuse to allow it?

A. I would. He might have required affidavits swearing back of the date of the Patriarca Patent.

Q. In other words,—

(Testimony of Donald Lippincot.)

A. Such a rejection could have been overcome, but undoubtedly it would have resulted in a primary rejection.

Q. How could it have been overcome?

A. If the inventor, if Patriarca, had made——

Q. I would like to call your attention to the fact that Cameron is later in filing date than Patriarca.

A. Excuse me. If Cameron had filed an affidavit under the rule,—I forget what it is in the new code—swearing back of the date of Patriarca's invention, since they were not claiming the same invention, it might have been proper to allow it.

Q. But no such affidavit was filed, is that correct?

A. But no such affidavit was filed. [204]

* * * * *

Mr. Gregg: I would like to have a copy of the Hoare Patent, 542745, marked as Defendants' Exhibit next in order.

The Court: Defendants' T.

(Whereupon the Hoare Patent, 542745, referred to above, was marked for identification as Defendants' Exhibit T.) [208]

* * * * *

The Clerk: Do you want T in evidence?

Mr. Gregg: T is what? I would like to offer Exhibit T in evidence.

The Court: That is the Hoare Patent. Do you want that in evidence?

Mr. Gregg: Yes.

The Court: That will be admitted into evidence.

(Testimony of Donald Lippincot.)

(Whereupon Defendants' Exhibit T for identification was received in evidence.) [222]

[See Book of Exhibits.]

* * * * *

Cross Examination

Q. (By Mr. Mellin): Mr. Lippincot, did you aid in the preparation of this case for trial?

A. To this extent. I was given copies of the file wrapper, I was given copies of the references that have now become the exhibits, and I naturally talked over the nature of the facts [223] that were developed in this. I had nothing to do with it other than in connection with my own testimony.

Q. I see. Now, commencing with the time that you were with Jensen and Magnavox and even prior to that time, and even while you were in the service, practically all of your active professional life has been very closely associated with electric and electronic equipment, radio and so on, isn't that correct?

A. A great deal of it has been in that field.

Q. In fact, substantially all of it, isn't that a fact?

A. No, I can't say that. Because I had a good deal to do, in the years when I was running a private development laboratory as partner in a patent development or promotion of patented inventions, inventions of all characters came before me from—well, one of them that I remember was a non-loosening hammerhead, and from there all the way

(Testimony of Donald Lippincot.)

to most elaborate electronic inventions. In the period of time when I was working with motor protective devices, I had a great deal to do with convective currents, the loss of heat and heat flow. And similarly, I had a good deal to do with the development where electronics impinge on these other affairs. While I was in the army, I had considerable to do with the development of radio sounds and the measurement of humidity in transmitting the returns by radio.

Q. What I was actually getting at is, were you ever in the [224] retail business where they sold cigars?

A. I haven't been. I not only was never in the retail business where they sold cigars, but I do not even smoke cigars.

Q. Now, as a matter of fact, if someone hadn't told you, you wouldn't have known whether any of these cabinets in here were to display cigars or cheese, would you?

A. No. They probably would make very good cheese display cabinets.

Q. Now you have mentioned a lot of prior art devices, Mr. Lippincot. Which one patent would you say, in your opinion, and including this Exhibit A, this prior use, which one cabinet shown by those would you say most closely resembles what we have been calling this Patriarca cabinet?

A. If we are talking about the Cameron Patent on the Patriarca device, I would think that prob-

(Testimony of Donald Lippincot.)

ably the Rosenberg looks as much like it as any other. [225]

* * * * *

Q. (By Mr. Mellin): You heard counsel mention that there was a stipulation that the invention date of Cameron carried back to September of 1951, prior to November, 1951, the filing date of Patriarca Patent. In the light of those facts, the Patriarca Patent would not have been a proper reference against Cameron, would it?

A. As I stated, I believe——

Q. You can answer that yes or no, can't you?

A. No, it would not.

The Court: He can, and then explain it.

Mr. Mellin: Then explain it, certainly.

Mr. Gregg: Just a second, your Honor.

The Court: If it is capable of yes or no answer.

Mr. Gregg: I don't think there is any stipulation in that regard. There was an answer to an interrogatory giving that September, 1951, as the date. We didn't stipulate that the Cameron invention was made——

Mr. Mellin: All right. [226]

Q. (By Mr. Mellin): You heard Mr. Patriarca testify yesterday that he and Mr. Cameron worked and completed this thing in September. Now under those circumstances, if the Cameron invention were completed prior to the filing date of Patriarca, under no circumstances could have been a reference against Cameron, a proper reference?

A. Not a proper reference, no.

(Testimony of Donald Lippincot.)

Q. That's right. Now there likewise is a rule of law, isn't there, that you are familiar with, and you have been testifying indirectly to, that in order to be double patenting, the claim of one patent must include the device of the earlier expiring patent?

A. That's correct.

Q. All right. Now you heard counsel yesterday read a part of a claim of the Patriarca Patent and ask the witness if that didn't describe the Cameron artistic design. You heard that, didn't you?

A. I did.

Q. Can you infringe a part of a claim, Mr. Lippincot?

A. Well, frankly, it would appear to me that your opinion is that you can, because if you can take a device that reads on the Cameron Patent and go out and buy a humidifier in the open market and put it on the bottom when you know the device would need a humidifier, it appears to me that you would find yourself in the position of infringing the patent. You see my [227] point?

Q. Well, you would also have to put a perforated shelf on it, wouldn't you, in the Cameron design?

A. If you will notice that design, you will also notice that what is apparently perforated shelves in one is shown in substantially the same manner as perforated shelves in the other.

Q. Aren't those lines shading?

The Court: Which lines?

The Witness: Which lines?

(Testimony of Donald Lippincot.)

Q. (By Mr. Mellin): The shading lines?

The Court: Which shading lines?

Q. (By Mr. Mellin): Well, for example, you notice on the description here it is shown as perforations. You don't find that in the Cameron, do you?

A. I interpret them in the same way. The cross-hatching looks to me like a variance that would come only as between two drawings made by the same of different draftsmen.

Q. All right. Now in order that you indicate a cabinet just exactly as shown in the Cameron, without a humidifier, and did not use a humidifier with it, it doesn't come within the scope of the claims of the Patriarca Patent, does it? A. No.

Q. And in other words, to be double patented, you would have to come within it? [228]

A. That's correct. [229]

* * * * *

Q. Now you heard the testimony as to what this cabinet accomplished. I am going to ask you a hypothetical question. Assuming that a cabinet of this type comes out and forthwith increases the sales of cigars in the hands of its users somewhere in the area between 30 and 50 per cent; would that to you be one indication that something had been done beyond the skill of an ordinary mechanic?

A. Not necessarily.

Q. Why do you say that?

A. Because there are a great many things which develop in the course of industry that are not pat-

(Testimony of Donald Lippincot.)

entable, that are arrived at step by step, and when the final step is taken that makes for commercial success, we have shown commercial success—we haven't shown what other factors enter into it. It might be one factor that would indicate that an invention might have been made, but it certainly would not show that an invention had been made.

Q. No, no, I say it would be one factor that would indicate an invention might have been made. Now——

A. As I remember the rules of law——

Q. Well, I am not—let's not speak about rules of law.

A. Well, I am stepping out of my proper function at the moment.

Q. You are now going into the role of an advocate, are you? [230]

A. No, I am not going into the role of an advocate.

Mr. Gregg: You have been asking him about rules.

Mr. Mellin: I didn't ask him about a rule of law. I asked him if that wouldn't indicate it.

Q. (By Mr. Mellin): I want to add one more assumption, Mr. Lippincot, and that is, if there had been many attempts to obtain a result over a period of years and there was an actual problem presented, isn't that another indication that an invention might have been made?

A. It is an indication that an invention might have been made, yes. I want to be sure I understand

(Testimony of Donald Lippincot.)

that, Mr. Mellin. Your question is, as I take it: If the device or whatever is produced satisfies a need,—— [231]

* * * * *

[Endorsed]: Filed August 20, 1957.

[Endorsed]: No. 16440. United States Court of Appeals for the Ninth Circuit. Patriarca Mfg. Inc., a corporation, Domenico Patriarca and Donald A. Cameron, Appellants, vs. Melvin Sosnick, Marvin Sosnick and Peter Sosnick, a co-partnership doing business as Melvin Sosnick Co., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: April 17, 1959.

Docketed: April 21, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16440

PATRIARCA MFG., INC., et al., Appellants,

vs.

MELVIN SOSNICK, et al., Appellees.

PATRIARCA MFG., INC., et al., Appellants,

vs.

ALFRED AUSTRUY, an individual, et al.,
Appellees.

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

1. The District Court erred in not holding Design Letters Patent No. D 168,288 valid.

2. The District Court erred in holding that Design Letters Patent No. D 168,288 is lacking in invention.

3. The District Court erred in holding that the Royal showcase is the same in appearance as the showcase design disclosed in Design Letters Patent No. D 168,288.

4. The District Court erred in not holding that the showcases sold and used by appellees herein

were infringements of Design Letters Patent No. D 168,288.

Dated: May 22, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1959. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Comes Now appellants above named and designate the following portions of the record, proceedings and evidence to be contained in the record on appeal.

1. Amended Complaint.
2. Answer.
3. Stipulation Re Answer.
4. Defendants' Notice of Additional Defenses.
5. Memorandum For Judgment.
6. Findings Of Fact, Conclusions Of Law And Judgment.
7. Notice Of Appeal.
8. Bond For Costs On Appeal.
9. Concise Statement Of Points On Which Plaintiffs Intend To Rely On Appeal.

10. This Designation of Contents Of Record On Appeal.

11. The following portions of the Reporter's Transcript of proceedings taken at the trial of this cause on January 16 and 17, 1957: Page 4, line 23 to page 5, line 10; page 13, line 2, words "Mr. Mel-lin:"; page 13, line 5, commencing with words "I will" to line 10; page 24, line 12 to page 41, line 13; page 42, line 3 to page 52, line 9; page 68, lines 6 to 12; page 78, line 12 to page 85, line 6; page 87, line 25 to page 88, line 14; page 89, line 9 to page 90, line 15; page 92, line 5 to page 134, line 14; page 136, line 6 to page 171, line 22; page 173, line 24 to page 175, line 17; page 175, lines 22 to 24; page 176, line 4 to page 180, line 17; page 181, line 4 to page 183, line 10; page 184, line 4 to page 193, line 22; page 193, line 12 to page 204, line 23; page 208, lines 18 to 22; page 222, lines 6 to 14; page 223, line 20 to page 225, line 16; page 226, line 8 to page 229, line 1.

12. Appellants' Exhibits 1, 2, 6, 7, 8, 9, 11, 12, 15, 16 and 17.

13. Appellees' Exhibits B, C, D, E, F, G, I, J, K, L, M, N, O, P, Q, R, S and T.

Dated: May 22, 1959.

MELLIN, HANSCOM & HURSH,
/s/ By JACK E. HURSH,
Attorneys for Appellants.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 25, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL PARTS OF RECORD ON APPEAL

Comes Now, appellees above named, and designate the following additional portions of the transcript of the proceedings to be contained in the record on appeal:

Page 41, line 14 through page 42, line 2;

Page 230, line 2 through page 231, line 13.

Dated this 29th day of May, 1959.

ECKHOFF AND SLICK,
/s/ By DOUGLAS T. CORBIN,
Attorneys for Appellees.

[Endorsed]: Filed June 1, 1959. Paul P. O'Brien,
Clerk.

